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"The Most Memorable Event"

THERE is no doubt, according to the Canadian Bar Association Journal, "that the joint meeting in London next July will be the most memorable event in the history of the English-speaking Bar, and will be of great international significance." The Journal proceeds to give details of the Canadian plans, which include a meeting at the Chateau Frontenac, Quebec, on July 7 and 8 for the transaction of necessary business, leaving on the latter date on the steamer Montlaurier for Southampton. It adds that "the President of the Association expresses the hope that the Canadian Bar Association will be strongly and well represented. This is the most ambitious project which has been undertaken by the Association and its professional and national importance cannot be over-estimated. We are convinced that no member of the Canadian Bar, who can arrange to make the trip, will fail to be attracted by the exceptional opportunity which he will have of participating in a historic gathering and of meeting the leaders of the profession not only from Great Britain, the United States of America and Canada, but also, it is hoped, from other parts of the British Empire."

Committee to Attend Wilson Funeral Services

A SPECIAL committee was appointed by President Saner to represent the American Bar Association at the funeral services of Woodrow Wilson, former President of the United States. It consisted of John W. Davis, Charles Henry Butler, Hampson Gary, Thomas W. Gregory, W. H. Lamar, Walter George Smith, Henry W. Taft, Frederick E. Wadhams, Charles S. Whitman, Secretary W. Thomas Kemp and Acting Secretary William C. Coleman. Most of the members went to Washington for the services. The Secretary and Acting Secretary being unable to attend, they were represented on the committee by Assistant Secretary Fell.

International Law Association Conference

THE thirty-third conference of the International Law Association of which the Earl of Reading, Viceroy of India, is President, will be held in Stockholm, beginning Sept. 8th next. The conference at Stockholm is to be held after the meeting of the American Bar Association in London in order that many American lawyers who are members of the International Law Association may attend. The Government of Sweden has made elaborate preparations to entertain the visiting lawyers.

The Stockholm conference will receive reports from special committees in various countries who have been working on a new code of international law, but one of the most important subjects to be considered is the subject of the protection of minorities under the League of Nations and the Statute of a Permanent International Criminal Court. Reports will be received from the committees of neutrality, foreign judgments, systems of evidence, aviation, international organization, codification, nationality and commercial arbitration.

Chief Justice Taft of the United States Supreme Court was elected Honorary President of the American branch of the International Law Association at the recent meeting in New York, and Amos J. Peaslee succeeded Dr. Arthur K. Kuhn as Honorary Secretary. Former Supreme Court Justice Harrington Putnam was elected President. The other new officers are: Vice-Presidents, Sir Robert Borden of Ottawa, Canada; Dr. Charles Noble

Gregory of Washington, D. C.; Everett P. Wheeler, John W. Davis and Dr. Arthur K. Kuhn of New York; Treasurer, Ira H. Brainerd of New York, and Chairman of the Executive Committee, Edwin R. Keedy of Philadelphia.

Winner of American Peace Award

ANNOUNCEMENT has been made that Charles H. Levermore, of New York, is the author of the plan chosen by the committee of the American Peace Award as the "best practicable plan by which the United States may co-operate with other nations to achieve and preserve the peace of the world." Dr. Levermore has long been a student of international affairs and has written a number of books on that subject. He has also been an instructor in various colleges, including the University of California, the Massachusetts Institute of Technology, and Adelphi College, Brooklyn. He is a graduate of Yale University and has a Ph. D. from Johns Hopkins. Since 1917 he has been secretary of the New York Peace Society. He is the author of a series of year books on the League of Nations. At a meeting held at the Academy of Music in New York on the evening of Feb. 4th, Dr. Levermore's success in the competition was announced, and Hon. John W. Davis, Chairman of the Policy Committee of the American Peace Award, presented him with $50,000, which amount became due on the committee's selection of the plan, according to the terms of Mr. Bok's gift.

Proposed Constitutional Changes in Missouri

TWENTY-ONE amendments to the Constitution of Missouri, proposed by the constitutional convention of 1922-23, will be voted on at a special election to be held on February 26th. The customary address to the people explaining the purport of the various amendments has been issued under the authority of the convention. Of the various amendments, No. 7, providing for the organization, jurisdiction and procedure of the courts, is perhaps exciting the greatest interest. It is stated in the address that this amendment contains a complete plan for the simplification of the court system. "A judicial council is established consisting of the Chief Justice of the Supreme Court, the presiding judges of each division of the Supreme Court, the presiding judges of each of the Springfield and Kansas City courts of appeal, a judge of the St. Louis court of appeals, and three circuit judges. This council is given power to establish such rules of practice and procedure in the courts as do not deny or change any remedy or substantive right given by law. The existing laws pertaining to procedure and practice are continued in force until changed by the council, and all rules made by the council are subject to change or repeal by the general assembly. The council will keep in touch with all the courts so that the condition of the dockets therein may at all times be before it. Circuit judges who have completed their dockets may be sent to other circuits where the dockets are congested, or such judges assigned to act as judges of the courts of appeal or of the Supreme Court, as the business of such courts may require, and cases pending before one court of appeals, where the docket is congested, may be transferred to another court of appeals. The Chief Justice of the Supreme Court shall be elected as such, and he is made the chief administrative officer of that court and of the judicial council. All judges to be elected after the year 1924 are to be nominated at different times from those at which other officers are nominated. This is intended to remove the courts, so far as possible, from political campaigns."

Thirty-Four Years on the Appellate Bench

RETIREMENT of Judge John P. Briscoe from the bench of the Court of Appeals of Maryland, after a continuous service of some thirty-four years, was commemorated at a special session of the Court on Tuesday, January 8, 1924. The Maryland State Bar Association, at a meeting held on November 16 last, adopted a resolution providing for the appointment of a committee to arrange and prepare a suitable tribute in the name of the Bar of Maryland in recognition of the services rendered by Judge Briscoe. The committee was composed of William L. Marbury, chairman, Joseph C. France and Attorney-General Thomas H. Robinson.

The resolution prepared by the committee extolled Judge Briscoe's long and valuable services and ended with the statement that "he will leave his high office with that satisfaction which can only come from the consciousness of duty faithfully performed." It was read by Mr. Marbury and addresses were made by F. Neal Parke, Randolph Barton, Jr., George Weems Williams and Joseph C. France. Chief Judge A. Hunter Boyd responded on behalf of the Court and Judge Briscoe also answered. Since 1921 Judge Briscoe has been chairman of the Judicial Section of the American Bar Association.

Income Tax Reduction Resolution

MENTION was made in the January issue of a resolution offered by Mr. Whitman and passed by the Executive Committee at Philadelphia in favor of the proposed reduction in income taxes. In order to bring it more specifically to the attention of members of the Association, in accordance with its purpose, it is herewith printed:

RESOLVED, That the Executive Committee of the American Bar Association strongly urge upon the Federal Congress, legislation providing for income tax reduction. Especially do we endorse the proposed twenty-five per cent reduction in the tax imposed upon earned incomes. And be it

FURTHER RESOLVED, That a copy of the foregoing resolution be sent forthwith to the Chairman of the Committee on Ways and Means of the House of Representatives, and to the Chairman of the Finance Committee of the Senate, and to the members of this Association, accompanied in the latter case by a letter requesting that the members ask their local Congressmen and Senators to vote in favor of such proposed tax amendment.

New Committee Appointments

PRESIDENT SANER has announced the appointment of the following officers of the Naturalization Committee, the membership of which was printed in the November JOURNAL on Page 703: Mitchell D. Follansbee, Chicago, Illinois, chairman; Wallace McCamant, Portland, Oregon, vice chairman; George A. Bacon, Springfield, Massachusetts, secretary.

LINCOLN, THE LITIGANT

Recent Search of Court Records of Old Eighth Illinois Judicial Circuit Reveals Interesting Details of Litigation to Which Lincoln Was Party—His Business-like Method of Collecting Fees—New Light on the Famous Illinois Central "Fee" Case — A Proceeding that "Harassed His Feelings"

By WILLIAM H. TOWNSEND*
Of the Lexington, Ky., Bar

MUCH has been written about Abraham Lincoln as a lawyer. How he tried cases; his power before a jury; his skill in the interrogation of witnesses; and his high professional integrity are familiar to everybody. It is rather curious, therefore, that the litigation which undoubtedly concerned Lincoln most and which, to use his own words, "harassed" his "feelings a good deal," has almost entirely escaped notice.

Until the court records of the old Eighth Illinois Judicial Circuit which Lincoln rode were recently searched by the writer and the law papers of the firm of Lincoln & Herndon examined, little or nothing was known of but a few of those cases in which Lincoln was himself either plaintiff or defendant. This investigation reveals the remarkable fact that, although a man of rugged, unswerving honesty and a lawyer of the finest professional ideals, Abraham Lincoln was a party to more lawsuits than was the average lawyer or citizen even of his own rather litigious day.

Yet no lawyer on the Circuit was so modest in his charges as Lincoln. His fees were notoriously inadequate for the services rendered, but the remonstrance of his friends and associates at the bar that he was "ruining the profession" availed nothing. This is strikingly illustrated by a letter that he wrote to his client, George P. Floyd, for whom Lincoln had obtained a lease on a valuable piece of hotel property in Quincy, Illinois, and, as no fee had been fixed, Floyd sent his lawyer twenty-five dollars. In a few days he received the following reply:

Geo. P. Floyd, Springfield, Illinois,
Quincy, Ill. February 21, 1856.

Dear Sir:

I have just received yours of 16th, with check on Flagg & Savage for twenty-five dollars. You must think I am a high priced man. You are too liberal with your money.

Fifteen dollars is enough for the job. I send you a receipt for fifteen dollars and return to you a ten dollar bill.

Yours truly,
A. LINCOLN.

However, it is not true, as has been claimed, that Lincoln was indifferent to compensation for his legal services. His attitude in this respect is succinctly stated in his "Notes for Law Lecture," in which he said: "The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done both lawyer and client. An exorbitant fee should never be claimed. As a general rule never take your whole fee in advance, nor more than a small retainer. Settle the amount of fee and take a note in advance. Then you will feel that you are working for something and you are sure to do your work faithfully and well." And this was the practice Lincoln followed, although it occasionally got him into trouble, as will be seen later. He accepted a small retainer, the old office docket showing one as low as $2.80, and took a note for the balance due upon final conclusion of the case.

When that case was finished, however, Lincoln was not slow to undertake collection, as is shown by the following characteristic letter:

Andrew McCallen, Springfield, Ill.
Dear Sir: July 4, 1851.

I have news from Ottawa that we *win* our Gallatin and Saline county case. As the Dutch justice said when he married folks, "Now vere ish my hundred tollars."

Yours truly,
A. LINCOLN.

Biographers have stated that Lincoln never sued for a fee, except in the notable instance of the Illinois Central Railroad case. But the files of the Eighth Circuit tell a different story. They show that Lincoln not only demanded equity and justice for others, but insisted on a square deal for himself as well. Having made a reasonable charge and having rendered a full measure of services for it, he expected the balance of his fee to be paid. The execution of the note was no idle formality. He did his part and saw to it that the client did likewise, even if the aid of the courts had to be invoked.

The first suit ever brought by Lincoln for a fee is styled "Abraham Lincoln vs. Spencer Turner and William Turner" and was filed in the Dewitt Circuit Court, Clinton, Illinois, at the October term, 1841. Recovery was sought on a note executed by defendants May 30th, 1840, payable to "A. Lincoln" ninety days after date. A plea that Spencer Turner was under legal age at the time he signed the note was made, but on Thursday, October 7, 1841, judgment was rendered for the plaintiff in the sum of $200 with $13.50 damages and costs. No process had been obtained at this time on the other defendant, but Lincoln's persistency is indicated by the record which shows that almost five years later, on Thursday, April 30, 1846, a judgment was entered against William Turner also.

The next suit was filed by the firm of Logan & Lincoln against Jas. D. Smith, executor under the will of Wm. Trailor, deceased, in the Sangamon Circuit Court, Springfield, Illinois, at the July term, 1845. The Declaration is in Lincoln's handwriting and alleges defendant's failure to pay a fee of $100 "for defending said Trailor against a charge of murdering one Fisher." On Wednesday, November 19, 1845, plaintiff obtained judgment for the full amount and costs.

At the same term of the Sangamon Circuit Court, the case of "Stephen T. Logan and Abraham Lincoln, late doing business under the style and firm name of Logan & Lincoln" against John Atchison was com-

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menced by filing a declaration written by Lincoln for the recovery of an attorney's fee of $200. On Tuesday, July 29, 1845, a jury returned a verdict for Lincoln and his partner, but only for $100 and costs.

At the March Term, 1850, of the same court, Lincoln filed suit, under the firm name of Lincoln & Herndon, against John B. Moffett on an account which, written by the senior partner, appears as follows:

To attending suit with Lewis and others, Sangamon Circuit Court	$100.00
To attending suit with Lewis et al in Supreme Court	50.00
	$150.00

Lincoln apparently compromised this suit for half of the account, as on Wednesday, March 20, 1850, an agreed judgment was entered against the defendant for seventy-five dollars and costs.

About this time Lincoln defended one Samuel Short in the Christian Circuit Court on a charge of shooting and wounding with intent to kill. Short was a farmer living near Taylorville and had fired with a shotgun on a party of boys who were raiding his melon patch, seriously wounding one of them. He was indicted and tried for this offense, but successfully defended by the tall, lank lawyer from Springfield. Short showed his appreciation by refusing to pay his attorney fee and Lincoln promptly sued him in the court of a Justice of the Peace.

In August, 1854, at Springfield, Lincoln sued Samuel Sidner on a note for $500. Evidently he had taken the precaution in this instance of securing the note by a lien on real estate, for he prayed that foreclosure be had on "the east half of Lot Four in Block 1 of the old Town plat of the late Town, now City of Springfield." Judgment was obtained on November 21, 1854, for the principal and interest amounting to $594.80, and on February 5, 1855, Lincoln purchased the property at the Court sale.

The last suit in which Lincoln appeared as plaintiff grew out of the most important case he ever handled. By an Act of the Legislature, the State of Illinois had exempted the Illinois Central Railroad from an ad valorem tax on its property and franchise, assessing its taxes on an earning percentage basis. Various counties in the State became dissatisfied with this method, since they obtained no revenue from it, and began to consider the advisability of testing the legality of the Act. While the matter was under discussion, Lincoln wrote the following letter:

T. R. Webber, Esq. Bloomington, Sept. 12, 1853.

My dear Sir:

On my arrival here to Court, I find that McLean county has assessed the land and other property of the Central Railroad for the purpose of County taxation. An effort is about to be made to get the question of the right to so tax the Co. before the Court and ultimately before the Supreme Court, and the Co. are offering to engage me for them. As this will be the same question I have had under consideration for you, I am somewhat trammelled by what has passed between you and me, feeling that you have the first right to my services, if you choose to secure me a fee something near such as I can get from the other side.

The question in its magnitude to the Co. on the one hand and the counties in which the Co. has land on the other is the largest law question that can now be got up in the State, and therefore in justice to myself, I can not afford, if I can help it, to miss a fee altogether. If you choose to release me, say so by return mail, and there an end. If you wish to retain me, you had better get authority from your court, come directly over in the stage and make common cause with this county.

Very truly your friend,
A. LINCOLN.

After giving the taxing authorities reasonable time in which to secure his services, Lincoln wrote to Mason Brayman, Counsel for the Railroad:

Pekin, Oct. 3, 1853.

Dear Sir:

Neither the County of McLean nor anyone on its behalf has yet made any engagement with me in relation to its suit with the Illinois Central Railroad on the subject of taxation. I am now free to make an engagement for the road, and if you think of it you may "count me in." Please write me on receipt of this. I shall be here at least ten days.

Yours truly,
A. LINCOLN.

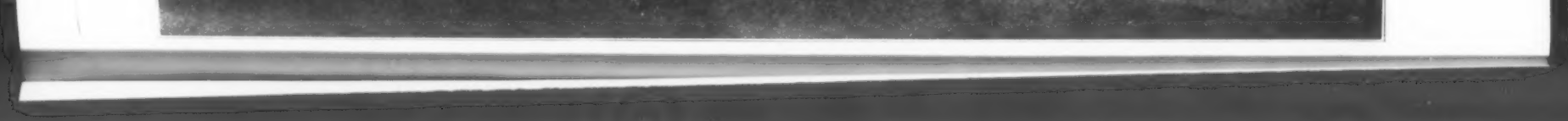
These letters show that Lincoln was not the careless, easy-going lawyer that he has sometimes been pictured. Here was an active, vigorous attorney keeping a close eye on his practice. He could not afford to miss a fee and said so frankly. And he was quite willing to accept employment on either side. With characteristic fairness he was careful, however, to give the first chance to those who he felt had the prior claim to his services.

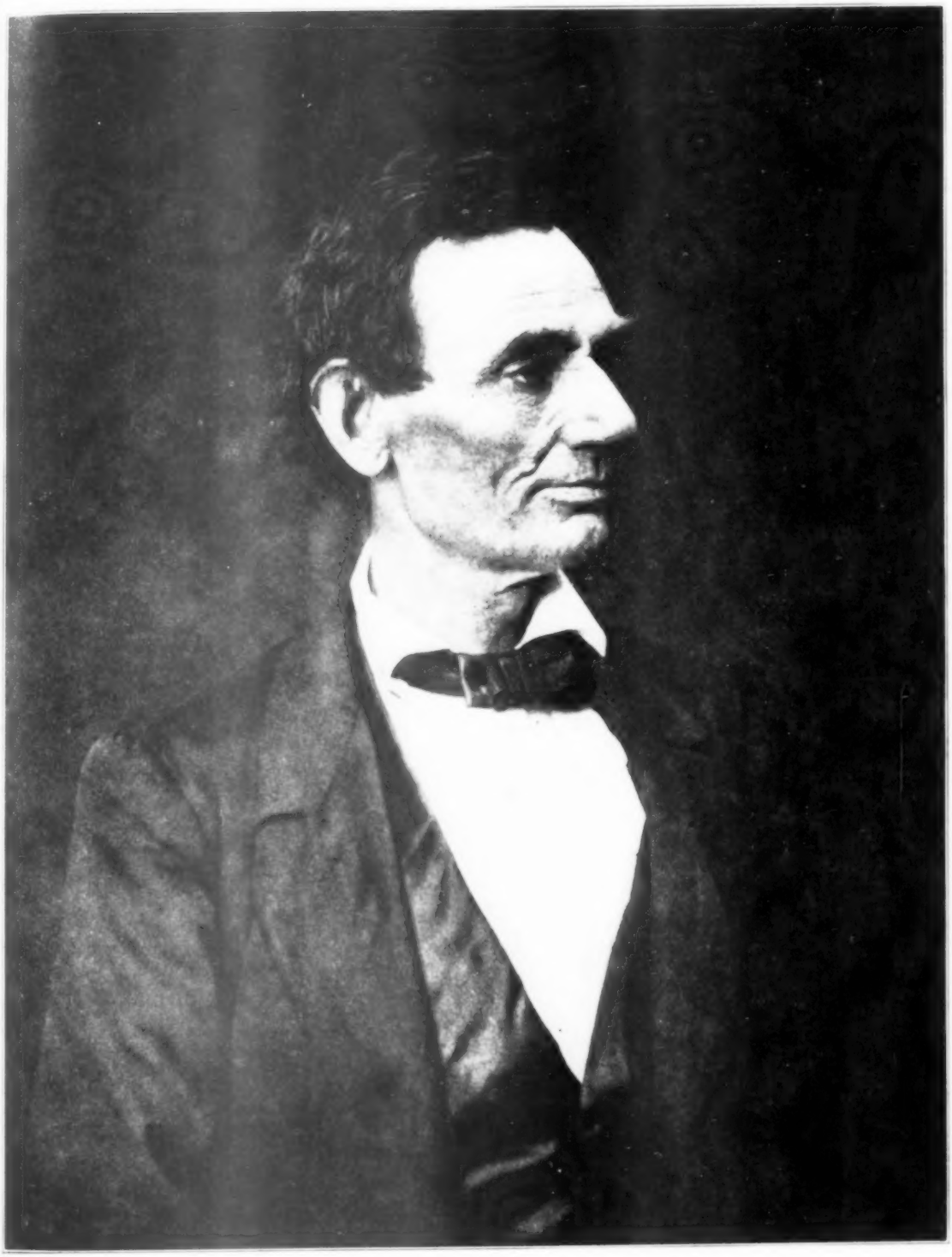
A short time thereafter a suit was filed in the McLean Circuit Court styled: "Illinois Central Railroad Co. vs. County of McLean," seeking to enjoin the collection of the tax imposed by the county. Lincoln represented the Company and S. T. Logan and John T. Stuart, his former law-partners, appeared for the County. After a bitter contest, the Circuit Court decided that the Company must pay an ad valorem tax in every county through which the railroad passed. This meant bankruptcy and Lincoln appealed to the Supreme Court of Illinois in a last effort to save his client. Finally, after he had argued the case twice, the Supreme Court at the December term, 1855 (17 Illinois Supreme Court Reports, page 291), decided for the Railroad and Lincoln won a complete victory.

The events which followed the winning of this suit have long been matters of controversy. Herndon, then Lincoln's law partner, says that Lincoln presented his bill of $2,000 for legal services, but that the Company rejected it with the statement that this amount was "as much as Daniel Webster himself would have charged," and that Lincoln, "stung by the rebuff," increased the fee to $5,000 on advice of the most prominent members of the Bar who knew the value of his services.

On the contrary, the Railroad, in a sumptuously bound brochure which it published in 1906, claims that Lincoln was informed that "the payment of so large a fee to a Western lawyer without protest would embarrass the General Counsel with the Board of Directors in New York," but that, if suit was brought, the Company would "promptly pay the amount of the judgment." Apparently, according to its own admission, its attorney fees were controlled more by geography than achievement.

However this may be, the record shows that Lincoln, having waited more than fifteen months for his well-earned compensation, filed suit against the Illinois Central Railroad Company in the McLean Circuit Court at Bloomington at the April term, 1857, seeking recovery of his fee of $5,000. When the case was called on Thursday morning, June 18, 1857, and no one appeared for the defendant, Lincoln took a default judgment for the full amount. That afternoon, John M. Douglass, a solicitor for the Company, arrived and was much chagrined to find that judgment had already been rendered against his client. Going to Lincoln, he told him the predicament in which he was placed by having been late and appealed to him





From a rare unretouched photograph in the collection of William H. Townsend, of Lexington, Ky.

for a retrial. To this Lincoln generously agreed, the default judgment was set aside, and the case again set for trial.

On Tuesday, June 23, 1857, the case was called and a jury empanelled. The proceedings on this occasion seem to have been very informal. Lincoln read the depositions of several leading lawyers, including O. H. Browning and Archibald Williams of Quincy; Norman B. Judd, Isaac N. Arnold and Grant Goodrich of Chicago, and Stephen T. Logan of Springfield, who had opposed Lincoln in the tax suit. A local lawyer was also called as witness.

Mr. Charles L. Capen of Bloomington, former President of the Illinois Bar Association and one of the oldest lawyers in his State, is probably the only living person acquainted with the incidents of this trial. In a letter to the writer, dated September 3, 1823, Mr. Capen says: "The Company did not ask cross questions, had no witnesses, said nothing at the trial and made no speech. Mr. Lincoln spoke a few minutes." He then relates that, as Mr. Lincoln "got up to speak to the jury, a button on his trousers gave way. Saying 'wait a minute 'til I fix my gallusses,' he took out a knife, whittled a stick, and used that in place of a button." Before the case was over, Mr. Lincoln recalled that he had already received two hundred dollars as a retainer and asked the jury to return a verdict for $4,800, which the jury promptly did.

After a critical examination of all the evidence, the writer had about reached the conclusion that this celebrated suit was a mere formality as contended by the Company, when a bit of evidence came to light not hitherto known to students of the subject. On the margin of the judgment recorded in the McLean Circuit Clerk's office appears this significant entry: "Execution issued to Sheriff Moore, August 1, 1857." It is, therefore, apparent that the Company did not "promptly pay" the judgment as it says it did, and doubtless would have done had the suit been merely formal. Thirty-eight days after a jury had said that Lincoln was entitled to his fee, the claim remained unsatisfied, and it was not until the Sheriff had been directed to seize the property of the railroad that payment was made.

In this connection it may be noted that recent investigation disproves another oft-quoted illustration of Lincoln's alleged slipshod methods in business matters. Herndon, usually accurate, but writing many years afterward, says that Lincoln came in from Bloomington with the Illinois Central fee in his pocket and that he divided the cash with his partner on the spot. Aside from the fact that corporations do not pay large claims in cash, the old ledger of the Springfield Marine Bank, where Lincoln kept his account, contradicts this statement by an entry on August 12, 1857, showing a deposit on that date to the credit of A. Lincoln of $4,800, the exact amount of the judgment.

Lincoln continued to represent the Railroad Company and to ride on its pass as long as he practiced law. And it may be, as Mr. Capen thinks, that Brayman, the general counsel, was responsible for this suit and that Lincoln's resentment was directed toward him personally and not against the corporation. Still, one cannot examine the evidence without feeling that the Company on this occasion did not accord to its great lawyer quite the consideration to which he was entitled.

The first suit in which Lincoln was a defendant is filed in the Sangamon Circuit Court, dated August 10, 1833, and styled "Jas. D. Henry for the use of Jas. McCandless & Henry Emerson vs. Nelson Alley & A. Lincoln." Judgment is asked on a note dated October 30, 1832, for $104.87½, signed by both defendants. Summons was served on Lincoln August 20, 1833, and George Forquer was attorney for the plaintiff. Lincoln and Alley were then residents of New Salem, and Alley was the owner of the now famous Rutledge tavern where Lincoln lived and courted the lamented Ann Rutledge. At this time Lincoln's finances were at the lowest ebb. The store of Berry and Lincoln, in the graphic language of the junior partner, had "winked out," leaving a tremendous load of debt on Lincoln's shoulders. Since spring of that year he had been the village postmaster, but the income from this source, together with his earnings from odd jobs as saw-mill and harvest hand, scarcely sufficed for the barest necessities.

The indications are that Lincoln was merely an accommodation surety on this note, although his signature at this time could have hardly improved the paper. No defense seems to have been made and on Friday, September 13, 1833, a default judgment was entered for the plaintiff. The judgment was evidently collected, as the execution book shows that it was "satisfied in full March 17, 1834, as per Sheriff return."

It is an interesting fact in connection with this case that the lawyer who filed the first suit against Lincoln was destined to be known to posterity as the victim in later years of Lincoln's famous "lightning rod" speech. In the spring of 1836 Lincoln was a candidate to succeed himself in the Illinois Legislature, and the race was growing warm and bitter. One afternoon the young candidate made an eloquent and convincing speech in an attempt to calm the rising passions of both parties. As he finished, George Forquer, who had sued Lincoln several years before, rose to reply. Forquer had recently left the Whigs and gone over to the Democratic party, where his ability as a politician had immediately secured his appointment as Register of the Land Office at a lucrative salary of $3,000 a year, and he lived in a fine house on which he had erected the only lightning rod in Springfield. With an air of lofty superiority, Forquer began his speech by saying that the young man who had just spoken needed to be taken down and that he was sorry that the task had fallen to him. He then proceeded in a most contemptuous vein toward the tall, ungainly candidate. Hot with resentment, Lincoln took the platform when his self-appointed opponent had finished and delivered a scathing reply, concluding as follows:

> Mr. Forquer commenced his speech by announcing that the young man would have to be taken down. It is for you, fellow citizens, not for me, to say whether or not I am up or down; but he forgets that I am older in years than I am in the tricks and trades of politicians. I desire to live and I desire place and distinction, but I would rather die now than, like the gentleman, live to see the day that I would change my politics for an office worth $3,000 a year, and then feel compelled to erect a lightning rod to protect a guilty conscience from an offended God.

On the 26th day of August, 1833, Alexander Trent and Martin S. Trent sued David Rutledge, William Green, Jr., and Abraham Lincoln at Springfield on a bond for $150, executed by defendants January 31, 1833, and drawn in Lincoln's handwriting, to secure the conveyance of "the east half of Lot number five South of Main Street in the first survey in the town

of New Salem." On Monday, September 16, 1833, an agreed order was entered in this case dismissing the suit and providing that "each party pay half of the cost." John T. Stuart, who was to be Lincoln's first law partner, represented the Trent Brothers, who were also Lincoln's clients in his first case.

While Lincoln was reading law at New Salem, a dispute arose between Jack Kelso and the Trents over the ownership of a white hog. Lincoln represented the two brothers and brought his first suit in the court of Squire Bowling Green. On the trial the plaintiffs proved positively by three witnesses that the hog belonged to them. Kelso had no witnesses except his own testimony. In summing up the case for his clients, Lincoln argued to the Court that the rules of evidence required a decision according to the preponderance of the proof, to which the old Squire responded: "Abe, all you say may be true, but this court has in mind another rule of law which says that a case should be decided according to the actual facts. Now the Court knows these witnesses and he also knows this hog. He knows these witnesses are lying and personally knows this shoat belongs to Kelso—Judgment for the defendant."

The next suit against Lincoln grew out of his unfortunate venture in the grocery business with William F. Berry. The firm of Berry & Lincoln had purchased a stock of groceries in New Salem from one Reuben Radford and had executed a note to him on October 19, 1833, for $379.82. This note was assigned by Radford to Peter Van Bergen who, alone of all Lincoln's creditors, refused to wait for his money and filed suit on April 7, 1834. Various biographers have placed this litigation in the court of Lincoln's old friend, Bowling Green; others before Squire Edmund Greer. However, a search recently made by the writer uncovered the original papers in the Sangamon Circuit Court at Springfield.

Lincoln was summoned on August 20, 1834. It has hitherto been the general impression that Berry, a dissolute fellow, had died prior to the time this suit was brought, but the record shows him to have been living then, as summons is served on him five days earlier than on Lincoln. The note had been reduced by partial payments to $204.82, of which Van Bergen was entitled under the assignment to $154, and Radford to the balance. Tradition has it that Wm. Green, surety on the note, gave up his horse on the debt and this is substantiated by a credit thereon, to wit: "Received on the within obligation thirty-five dollars in part pay of a horse beast October the 11, 1834. R. Radford." It also appears that Berry himself satisfied the small remaining balance due Radford according to the following assignment: "I assign the within obligation to Wm. F. Berry for value received of him this the 19th Day of Nov., 1834. R. Radford."

But the defendants were unable to meet Van Bergen's part of the note and on November 19, 1834, a judgment was entered against Lincoln and his co-defendants for $154 and costs. An execution was issued under this judgment and the Sheriff took possession of all the poor worldly belongings of Abraham Lincoln. By the levy on his horse, saddle, bridle, compass, chain, and other surveying instruments, he was deprived of the very means whereby he had begun to earn an independent livelihood. But in the midst of his distress, a friend came to the rescue in the person of "Uncle Jimmie" Short, who "liked Abe Lincoln." On the day of sale, he bid all the property in and gave it back to Lincoln. With tears of gratitude in his earnest gray eyes, Lincoln thanked his benefactor. "Uncle Jimmie, I'll do as much for you some time," he said. And in this, as in all other things, Lincoln kept his word. After he went to Springfield to practice law, he paid Short back in full, and years afterward, when the old man, having lost his property, had moved to California, penniless, "Uncle Jimmie" received, without solicitation, a commission from President Lincoln appointing him Indian Agent.

Lincoln's troubles were not yet over with the end of the Van Bergen suit. The horse which he had come so near losing was not fully paid for. Lincoln had purchased the animal from Thomas Watkins, of Petersburg, for fifty dollars, to be paid in installments. Ten dollars still remained unpaid and Watkins, although one of the wealthiest men in Menard County, became uneasy about his money and sued the young deputy surveyor for the balance of the purchase price in the court of Squire Edmund Greer. From some source, Lincoln borrowed the ten dollars and settled with Watkins before final judgment.

The last suit in which Lincoln was a defendant is undoubtedly the most vexatious experience of his legal career. Until the record was discovered by the writer in January, 1922, among the dusty files of the Fayette Circuit Court at Lexington, Ky., and recently published by Houghton Mifflin Company under the title of "Abraham Lincoln, Defendant," the incident was wholly unknown and the statement by all Lincoln's biographers that his integrity had never been assailed by any person in any way was conceded beyond question.[1] These age-stained papers, together with the letters written by Lincoln to his local counsel, which were also unearthed from an attic where they had lain forgotten for nearly seventy years, disclose a most remarkable episode.

Lincoln's father-in-law, Robert S. Todd, operated a large cotton factory for many years near Lexington, Ky., under the firm name of Oldham, Todd & Company. After his death in 1849, the business was continued in the names of the surviving partners, Oldham & Hemingway. On May 12, 1853, just as the estate of Robert S. Todd had been finally settled and the amount due Lincoln and his wife paid over to George B. Kinkead, one of Kentucky's most celebrated lawyers, representing the Springfield heirs, Oldham & Hemingway filed suit in the Fayette Circuit Court against Lincoln, alleging that the firm during Todd's lifetime had sent Lincoln various claims, aggregating $472.54, to collect from Illinois customers of the cotton factory, and that he had collected the entire amount, which he had converted to his own use. That this suit came like a bolt from the sky, is indicated by Lincoln's first letter to his lawyer:

Danville, Ill., May 27, 1853.

George B. Kinkead, Esq.
Lexington, Ky.

I am here attending court a hundred and thirty miles from home, and where a copy of your letter of this month to Mr. Edwards, reached me from him, last evening. I find it difficult to suppress my indignation towards those who have got up this claim against me. I would really be glad to hear Mr. Hemingway explain how he was induced to *swear* he *believed* the claim to be just! I herewith inclose my answer. If it is insufficient either in substance, or in the authentication of the oath, return it to me at Springfield (where I shall be after about ten days) stating the defective points. You will perceive in

1. EDITOR'S NOTE: The complete baselessness of the asperaion and Lincoln's prompt and unhesitating challenge of it are fully set forth further on in the text of this article.

my answer that I ask the Petitioners to be ruled to file a bill of particulars, stating *names* and *residences*, etc. I do this to enable me to absolutely disprove the claim. I can really prove by independent evidence every material statement of my answer, and if they will name any living accessible man, as one of whom I have received their money, I will *by that man* disprove the charge. I know it is for *them* to prove their claim rather than for *me* to disprove it; but I am unwilling to trust the oath of any man, who either *made* or *prompted* the oath to the Petition.

Write me soon.

Very respectfully,
A. LINCOLN.

On June 13, 1853, at the first day of court, Lincoln's answer was filed. It was an emphatic denial of the plaintiffs' allegations. It stated that the only money he had ever collected for Robert S. Todd was fifty dollars on an old account in 1846, which his father-in-law had directed him to retain; that even this small gift had been disclosed in his answer to the recent suit settling Todd's estate and had been deducted from the portion of said estate due his wife and himself. "Respondent cares but little for said fifty dollars," said Lincoln in his answer; "if it is his legal right he prefers retaining it, but he objects to repaying it *once* to the estate of said Robert S. Todd and *again* to said firm or to said Petitioners; and he particularly objects to being compelled to pay money to said firm or said Petitioners which he never received at all. . . . With the exception of the fifty dollars aforesaid, received by Respondent under the circumstances aforesaid, Respondent denies that he ever received anything whatsoever, to which said firm or said Petitioners could have a pretense of a claim."

Under the pleadings, the burden of proof was on Oldham & Hemingway and Lincoln waited impatiently for plaintiffs to sustain by evidence their assault on his honor. On July 6, 1853, he wrote Mr. Kinkead: "I feel some anxiety about the suit which has been gotten up against me in your court. . . . I have said before, and now repeat, that if they will name the man or men of whom, they say, I have collected money for them, I will *disprove* it." On September 13, 1853, the plaintiffs still making no move toward a trial, he wrote his lawyer again from Bloomington where he was attending court: "This matter harasses my feelings a good deal; and I shall be greatly obliged if you will write me immediately."

It is evident from the record of the settlement suit and Lincoln's correspondence that his brother-in-law, Levi Todd, who had fallen out with his sisters living in Springfield, Frances Wallace, Ann Smith, and Mary Lincoln, over certain advancements which he claimed his father had made to them, was the influence behind this suit. Lincoln writes Mr. Kinkead in one of his letters that he does not understand "Levi's statement (which I now suppose he is determined to make) that 'I told him I owed the amount attached.'"

At last the plaintiffs were compelled to file a statement containing the names of the persons whose accounts Lincoln was charged with having collected. When this was done, Lincoln promptly assumed the burden of proof himself. By depositions taken at Shelbyville on November 8, 1853; at Springfield on November 12, and at Beardstown on November 15, Lincoln completely refuted every charge made by plaintiffs against him. This evidence was so conclusive that the plaintiffs themselves filed a motion on January 16, 1854, to dismiss the case, which was done at their cost on February 10, 1854, when the next term of court began.

After an extended search, it is believed that every case in which Lincoln was a party has now been brought to light. This hitherto unexplored ground has been carefully sifted and the trail followed even off the beaten path that Lincoln trod. Poverty and misfortune have left their track along his way; misunderstanding and even malice have accompanied him, but, out of the dust and obscurity of the years, not one thing has been unearthed to the dishonor of that unique and immortal character.

The Association's Acting Secretary

The following biographical data about the Acting Secretary and Assistant Secretary of the Association, chosen by the Executive Committee at Philadelphia, will prove of interest to members:

William C. Coleman, born in Louisville, Ky., October 17, 1884—thirty-nine years old. Educated at private schools there and graduated from Harvard College, A. B., 1905, and Harvard Law School, L. L. B., 1909. Intermediate year 1905-6 spent in travel abroad. Admitted to the Maryland Bar 1910 and began practice in the Law Department of the Baltimore & Ohio Railroad, Baltimore. 1913 became a member of the firm of Semmes, Bowen & Semmes, Baltimore, and in 1920 resigned to organize own firm, which now exists under the name of Coleman, Fell, Morgan & Brune. Married (Elizabeth C. Brooke) 1917, and has three children.

1914-18 was Instructor in Negotiable Instruments at the University of Maryland Law School. 1916 was Secretary to the Maryland Educational Survey Commission, which was appointed by the Governor at the direction of the Legislature of that year, and studied and brought about complete legislative revision of the public school system of the State. 1917, of Counsel to the Alien Property Custodian, Washington. 1918 enlisted in U. S. Army. Attended officer's training school, Camp Zachary Taylor, Kentucky, August-November, 1918. 1922-24 Chairman, Executive Committee of the Baltimore Alliance, a corporation embracing the principal non-sectarian charitable and welfare organizations of Baltimore City. Has written a number of articles on various legal subjects which have appeared in the Harvard Law Review, Columbia Law Review and the American Law Review from 1910-1917 inclusive. Unsuccessful candidate on the Republican ticket for Attorney-General of Maryland, November, 1923.

Edgar Tremlett Fell, born in Baltimore, Md., in 1895. Received his early education in private schools and the Preparatory School of St. John's College, Annapolis. Graduated from St. John's in 1913, A. B. Entered the Law School of the University of Maryland the following year and graduated in 1917, L. L. B., and admitted to the Bar the same year. Received the degree of M. A. from St. John's in 1917 and studied in the graduate departments of Political Science, Economics and Law at Johns Hopkins' University, receiving the degree of Ph. D. there in 1920. Was attaché in the American Embassy, Madrid, Spain, in 1914; Captain of Infantry, U. S. Army, in France, 1917-1919. From 1919 to 1920 he was Assistant Professor of History and English at St. John's College, Annapolis. During the three year's 1920-1923, he was Admiralty Attorney for the United States Shipping Board in Washington, D. C. Published "Recent Problems in Admiralty Jurisdiction" 1920. J. H. U. Press.

The "Gallery's" Rights at Trials

"Allegations of preference in the admission of the public to the public galleries at the Old Bailey are to form the subject of an inquiry by Mr. Justice Greer, Sir George Truscott, and the Recorder. Strong complaints, it will be remembered, were made against the conduct of the fashionable 'audiences' which filled the Court during the Fahmy trial."—*The Law Journal*, Jan. 19.

LINCOLN'S INN

A Recent American Visitor and Sojourner Among the Inns of Court in London Describes One of These Famous Institutions—Worshipful Men of the Past Whose Names Are Associated With It—Historic Buildings—The Soul of the Place

By Cornelius Comegys

President of the Lackawanna County (Penn.) Bar Association

TEMPLE BAR is the center of a world all its own. The end of the Strand, the beginning of Fleet Street, and marking the limit of the City, next to it stands that magnificent Gothic structure in which are housed the High Courts of Justice, and but a few paces to the East, passing out of Fleet Street, the one southerly to the Thames, the other northerly towards Holborn and Gray's Inn, are two thoroughfares known by far-flung fame to all lawyers: the Middle Temple Lane and Chancery Lane—the one passing through the possessions of the Middle and Inner Temples, the other leading onward to the entrance of Lincoln's Inn.

At a distance of some two or three city blocks up Chancery Lane, after passing the imposing building of the Law Society, the home of the Solicitor branch of the profession, the perhaps weary wanderer comes to a structure the like of which he has never before seen. Evidently neither a place for habitation nor business enterprise, it is large enough for either purpose, and, of heavy masonry, it is strikingly peculiar in design: the time-worn Gate House of Lincoln's Inn. Its erection was begun in 1517 and finished, under the direction of one William Sulyard, a barrister of the Inn, in 1521. There are but three other such gate houses in London, and no others elsewhere—one at St. James' Palace, one at Lambeth Place, and one at St. John's, Clerkenwell.

The mind wonders at the thing, and perhaps if given to "wandering adown the past," may even here recall the names of some of those "worshipful men" who, once upon a time, were accustomed to enter there, possibly, among others, the names of Sir John Fortescue, Sir Thomas More, Sir Matthew Hale, and of Lords Mansfield, Brougham, St. Leonards, Campbell, Selborne, Cairns, Herschell and Russell; and again those of others who afterwards found their way to fame but not in professional path—Jeremiah Bentham, Macaulay, Courtney, Maine, Maitland, Pitt, Addington, Canning and Lord Haldane who, with Mr. Asquith, is of this generation.

Having passed through the portal, the American visitor probably finds in the venerable near-by buildings the places of greatest interest. Two of these, the Chapel and the Old Hall, are most worthy of his attention.

The present Old Hall, known as the Bishop's Hall, appears to have been in existence when the Society acquired the property in 1422. In 1227 a grant of land had been made to the Bishop of Chichester, who built there, for himself and his successors in holy office, a "nobilis palatio," and it is this noble palace of the Bishop that for centuries following its purchase became the feasting and frolicking place of the worldly-minded students of the Law.

In 1491 this abode of the righteous was, it seems, replaced in whole or in part, and in external appearance now remains what it then became. Nor, according to the Black Books of the Honorable Society, has there been much alteration in its interior. At the North end, in those days, stood the Bench Table at which the Benchers, the governing body of the organization, took their beef, bread and beer. Below were two tables reserved for the Bar, one the ancient Side Table, parallel to that of the Benchers, and, at right angles to it, the other, a long table extending along one side of the Hall. Another table, the one for the students, was on the side opposite to the long Bar table and parallel with it.

Such was the stage for the display of all sides of the life of the Society except that of divine service. Summoned hither by the blowing of a horn, barrister and student habitually came, in cap and gown, to a breakfast, a dinner and a supper, prefaced and concluded by a grace. In it, also, the Reader gave his readings, and moots and bolts were performed; in it, this same Reader feasted his guests, and the Treasurer gave his suppers; in it were the Christmas plays, the Candlemas dance, the dinners to the judges, and all the revelry of the Inn. Here, too, came a fool, Lobbe le Follet, and a harper, Robert the Minstrel; but with all this eating and drinking and merrymaking, and not a little horseplay at times, the spirit of a great tradition was not neglected; it was inspired by precept and stimulated by example. The place—a shrine—then had, as it now has, a soul.

Not far from this Old Hall stands the Church. In 1609 the Bench resolved that a "fair large chapel" should be built; and after, by various means and methods, a sufficient fund had been secured for that purpose, it was finally erected of Oxford free stone after plans made by Mr. Inigo Jones and Sir Christopher Wren. With much pomp and ceremony, with a great multitude of people in attendance, judges of the Court and other high dignitaries of the realm, it was consecrated on May 23, 1623, the then Bishop of London officiating. In need of restoration, it was altered somewhat by Wyatt, in 1797, and later, in 1883, was lengthened by Salter. The windows have been used to carry to future generations the names and fame of those most active and prominent, from time to time, in the organization, and contain the arms of the readers and treasurers of the Society since 1590. While the Old Hall is now only used as a place for lectures to students, the "fair large chapel" is still devoted to its original purpose, the worship of God.

As have the other Inns, so has this one, a garden—a garden almost surrounded by its buildings. A paved thoroughfare passes through the middle of it, from the gatehouse westward, dividing the domain of the Inn into apparently two equal, or nearly equal, parts; and standing in this roadway, it is possible for the visitor to get a satisfactory view of the Inn's possessions. Looking southward, the eye falls upon a

wide expanse of finely-kept lawn, decorated in excellent taste, with shrubbery and flowers, and encompassed on three of its sides principally by four-story brick buildings of comparatively modern date, in which are to be found the chambers of the barristers of the Inn. Then, to the north, with its graceful walks, its terraces and shade trees, and its extensive and beautiful lawn, lies the other or remaining section, on the easterly side of which are buildings likewise for chambers, and on the westerly, a greater building in which are the New Hall and the oldest library in London. This structure, designed in the collegiate style of the sixteenth century, is the most prominent feature in the way of a building within the walls of the place. Well adapted to the purposes of its use, it is of comparatively modern construction, and was opened by Queen Victoria, in 1845, who, in the presence of a vast multitude of subjects and nobility, then dedicated it to the service of the Law.

Exactly when the Library had its beginning is not, with certainty, known, but the records show its existence prior to 1475. That a library building might be built in the Inn, as it appears of record, one John Nethersole, in 1505, left by his will, forty marks to the Society for that purpose, and his wish was carried out in 1509. Since 1845 it has been housed in the New Hall and Library Building, and now contains about fifty thousand volumes, together with numerous valuable manuscripts, many of which were bequeathed to the Society by Sir Matthew Hale, who is now, and for all time will be, in all probability, the great light of Lincoln's Inn.

Here, with the Parliament Room, is also the New Hall. To meet the requirements of an increasing membership, it is much greater in dimension than its predecessor. Tradition, however, suggested its decoration and the arrangement of its appointments. Crosswise, at one end of the room, on a dais, stands the table for the Masters of the Bench, and lengthwise, reaching down the room, long tables for the barristers and students. It is filled with memorials of illustrious dead; and beginning with that of Sir John Fortescue, on its walls are to be seen the shields of its many successive treasurers. In 1852, G. F. Watts, O. M., R. A., decorated the north wall with a magnificent painting entiled "Justice, the Hemicycle of Law Givers."

The Constitution of this Inn is similar to those of the other three—not in writing, nor the product of any particular time or place, it was only gradually developed as the centuries passed along. The membership consists of judges, barristers and students, of which the governing or legislative body is made up of the Masters of the Bench, over whose deliberations a treasurer is annually elected by them to preside. It is the duty of these men to care for their Inn, and their peculiar privilege to call men to the Bar—to make of the student a barrister with the right to be heard in the High Courts—the exclusive privilege of the barrister.

In concluding this brief and necessarily imperfect sketch of Lincoln's Inn, it may not be amiss to say that the ancient chapels and halls of the several Inns of Court are all haunted, seemingly, by a multitude of memories that must, in a large measure, affect the manners and characters of the young men of whose lives they necessarily become a part, and may, to some extent at least, if not entirely, justify the assertion of a prominent barrister of the Middle Temple, that every English barrister is a gentleman.

Visit Should Be Memorable Success

"It is sincerely to be hoped that the Bar Council, with the Benchers of the Inns of Court and the Council of the Law Society, will do its utmost to make the visit of the American Bar Association to this country in July the memorable success it ought to be. Sir Douglas Hogg, in presiding at the meeting of the Bar, stated that between 700 and 800 visitors from the United States, and about 250 from Canada will cross the Atlantic to attend this great gathering in England, 'the birthplace of the laws of America equally with our own.' It will be most unfortunate if the meeting—in which the Canadian Bar Association is to join our own professional bodies in the capacity of hosts—is permitted to assume the character of a 'picnic.' Social functions, no doubt, there will be in plenty. They will, indeed, be an essential part of so fraternal a gathering. But the occasion will certainly be deprived of its true significance and usefulness if English lawyers, on the one hand, are not afforded more than one opportunity of hearing some of the most notable American jurists on legal questions of common interest on both sides of the Atlantic, and if our American cousins, on the other hand, do not enjoy a similar opportunity of listening to addresses by some of the most learned and distinguished judges and lawyers of England. No suggestions were invited, or made, at the Bar meeting. It may, however, be permissible to suggest that at least five meetings should be arranged—one in the Hall of each of the four Inns, and one in the Law Society's Hall, at which addresses of this character should be delivered. Only if some such arrangements are made can the great gathering—for which some 1,000 persons will cross the Atlantic, and to which all English lawyers are looking forward with rare interest—leave a permanent and worthy record."—*The Law Journal*, Jan. 26.

Latin and the International Court

"'As a member of the International Court of The Hague,' said Lord Finlay in a recent address, 'when I myself have occasion to quote Latin, I make a practice of reading it twice—once with the English pronunciation of the vowel sounds on which I was brought up, and a second time with the Italian vowel sounds, to make it intelligible to my colleagues.' It is to Rome that the science of jurisprudence owes its origin, and it would be a not unfitting thing if, a uniform pronunciation being adopted, Latin became the living language of the judgments, at least, of the Court in which that science now finds its best expression."—*The Law Journal*, Jan. 26.

A Rare Distinction

"Lord Birkenhead, whose election as Treasurer of Gray's Inn we recently announced, is filling the office for the second time. This is a distinction which has very rarely been enjoyed by a Bencher of any of the Inns of Court. He has again been elected to fill the office primarily to take the leading part on behalf of the Inn in the reception to be accorded next summer to the American Bar Association on its visit to London."—*The Law Journal*, Dec. 22.

REVIEW OF RECENT SUPREMF COURT DECISIONS

General Limitation of Right of State to Bring Suit Against Sister State—Procedure of Combination of Motion Picture Distributors Which Violates Sherman Act—Agreement Between Manufacturers and Laborers Apportioning Available Labor Among Factories Not a Combination in Unreasonable Restraint of Trade — Eminent Domain — State Revenue from Federal Forest Reserve—Estoppel—Appeals

By Edgar Bronson Tolman

Suits Between States

The right of a State of the Union to bring a suit in the Supreme Court of the United States against a sister State, is generally limited to controversies which between states entirely independent might properly be the subject of diplomatic adjustment or of possible resort to force.

By reason of the Eleventh Amendment of the Constitution a State may not as parens patriae maintain an action against a sister State for damages suffered by its citizens.

A State has such an interest as quasi-sovereign in the welfare of her farm owners that she may ask the Supreme Court for relief against another State, if by convincing proof it be shown that by a change in the method of drainage, such State has increased the flow of an interstate stream, throwing an excess of water upon the lands of its neighbor.

North Dakota v. *Minnesota,* Adv. Ops. 159, Sup. Ct. Rep. 138.

Interstate streams constitute a frequent source of controversy between States. Such controversies illustrate the possibility of settlement of disputes between two States, of equal sovereignty with respect to each other, by appeal to a court of common resort. In this instance the court qualified the jurisdiction claimed for it by the petitioner, upheld it as so qualified, examined the facts and found them insufficient to support complainant's allegations, and brought about a dispassionate examination of the facts, tending towards a correction of the physiographic conditions out of which the dispute arose.

North Dakota claimed that by the construction by Minnesota of certain cut-off ditches and by the straightening of the Mustinka River, which flows into Lake Traverse, its outlet, the Bois de Sioux River, was caused to overflow on to lands in North Dakota. The bill asked an injunction against the maintenance of this drainage system, and a money decree of $5,000 for damage done to roads and bridges, and of more than a million dollars for damage to farms. Minnesota contended that the overflow was caused by unusually heavy rains during 1914, 1915 and 1916. The Supreme Court concluded that Minnesota was not responsible for the overflow, and dismissed the bill without prejudice.

The Chief Justice delivered the opinion of the Court. After stating that one private party might be granted an injunction against another private party upon a showing of facts as here alleged, he said:

> The jurisdiction and procedure of this court in controversies between states of the Union, differ from those which it pursues in suits between private parties. This grows out of the history of the creation of the power in that it was conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. The jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment. They must be suits "by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air of its domain." "When the states by their union made the forceable abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; the alternative to force is a suit in this court." (Citing case.)

He reviewed briefly cases where injunctions had been granted in suits between States, and concluded:

> Where one state by a change in its method of draining water from lands within its border increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown on the farms of another state, the latter state has such an interest as quasi-sovereign in the comfort, health and prosperity of her farm owners that resort may be had to this court for relief.

But, he added:

> In such action by one state against another the burden on the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. "Before this court will be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

He concluded that by reason of the Eleventh Amendment the Court could not grant a money decree for damages resulting to private owners. It appeared that these owners were financing the suit, and that each expected to share in the benefit of the money decree. The learned Chief Justice said:

> The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state by a prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister State. For this reason the prayer for a money decree for the damage done by the the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley is denied for lack of jurisdiction.

The remainder of the opinion is devoted to a review and analysis of the evidence offered with respect to the cause of the overflow. Much of the expert testimony was conflicting. The learned Chief Justice was of the opinion, however, that the experts called by Minnesota were more to be depended on. The circumstances which led him to decide in favor of that State are summarized in the following sentence:

> When we consider the extent and prolonged period of the floods of 1915 and 1916, covering, as they did, the whole upper valley of the Red River, of which the Mustinka watershed was but a small part, when we note that

that watershed is only one half of what feeds Lake Traverse, when we find that all this upper Red River valley was drenched with continuous rain for two summer seasons, with a frozen flood between them, when it appears that the farmers of the Mustinka valley lost as much of their crops in 1915 and had as total a loss in 1916 as the farmers on the Dakota banks of the Bois de Sioux, when we know that these farmers in the Bois de Sioux are used to frequent floods in the spring for three to eight days, because of the low level of their lands, the system of state ditching in the Mustinka sinks into a circumstance of negligible significance in the consideration of the mighty forces of Nature which caused these floods.

After the first hearing of the case, the Court had ordered evidence taken as to possible engineering projects to ameliorate the flood condition. Some progress was made in this direction by the engineers' report, but in conclusion it was said:

The conclusion we have come to on the main issue of fact that Minnesota is not responsible for the floods of which complaint is made, makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin.

The case was argued by Mr. M. H. Boutelle for North Dakota and by Mr. Montreville J. Brown for Minnesota.

Sherman Act

A combination of motion picture distributors having a monopoly in that business, which refuses to furnish films to an exhibitor who refuses to purchase supplies from members of such combination violates the Anti-Trust Act.

Binderup v. *Pathe Exchange et al.*, Adv. Ops. 114, Sup. Ct. Rep. 96.

This case involved an action brought under the Anti-Trust Act of 1890 by an operator of moving picture theatres against various individuals and corporations engaged in the manufacture and distribution of films. The complaint alleged that the defendants controlled the distribution of all films within the United States, that they organized the Omaha Film Board of Trade, to enable the distributors to control prices and dictate terms, that when complainant refused to buy from certain members of this Board, defendants conspired, in restraint of interstate commerce, to refuse to supply him films. Judgment was asked for triple damages. After the opening statement had been made to the jury, the District Court for the District of Nebraska sustained defendants' motion for a directed verdict on the grounds that the petition did not clearly show the court's jurisdiction, or make clear any conspiracy sufficient to justify the court in proceeding further. Judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, but on writ of error to the Supreme Court, was reversed.

Mr. Justice Sutherland delivered the opinion of the Court. He first disposed of defendants' motion to dismiss the writ of error, made on the ground that the action of the trial court, in directing a verdict, constituted a challenge to the jurisdiction, from which direct appeal to the Supreme Court should have been taken, because, where the cause of action is based upon an act of Congress, the Federal Court is without jurisdiction unless the complainant states a case within the terms of the act. In denying this motion the learned Justice rejected this line of argument. He said in part:

Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged, any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in a complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color or merit (citing cases). In that event the claim of Federal right under the statute is a mere pretense, and, in effect, is no claim at all. Plainly, there is no such want of substance asserted here.

Coming to the merits, the learned Justice came to the conclusion that matters of interstate commerce were involved:

The business of the distributors, of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that, in the course of the process, the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessees in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end, and was not intended to end, the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character, "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

He cited in support recent cases holding that the handling of cattle by commission men did not interrupt the continuity of an interstate flow of livestock.

The alleged acts were held to constitute a conspiracy in restraint of such commerce. He said:

The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business. Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease, or exchange is within the terms of the Anti-Trust Act, denouncing as illegal every contract, combination, or conspiracy "in restraint of trade or commerce among the several states." . . . It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it, and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the Act; but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with the exhibitor.

This case was argued by Mr. Dana B. VanDusen for the exhibitor and by Messrs. William Marston Seabury and Arthur F. Mullen for the distributors.

Sherman Act

A wage-scale agreement between manufacturers and laborers, apportioning equally the available labor, insufficient to operate all factories, is not a combination in unreasonable restraint of trade.

National Association of Window Glass Manufacturers et al. v. *United States*, Adv. Ops. 154, Sup. Ct. Rep. 148.

At the suit of the United States, the District Court for the Northern District of Ohio enjoined certain

manufacturers of handblown window glass and an organization embracing all the workers in this industry from carrying out agreements limiting the time during which the manufacturers should operate their factories. The particular agreement under attack was one establishing a wage scale, and applying it to one set of factories for one period and to another set for a following period, thus forcing each set to close during the time it could not get labor. On appeal to the Supreme Court the decree was reversed and the petition dismissed.

Mr. Justice Holmes delivered the opinion of the Court. As this agreement did not concern sales or distribution, he said, it was not necessarily within the Sherman Act. The particular facts showed it was not. Invention of machines had made of hand blown manufacture an industrial survival, continuing by sufferance of the machine producers. The available laborers were few in number and growing fewer. The learned Justice continued:

> The defendants contend with a good deal of force that it is absurd to speak of their arrangements as possibly having any effect upon commerce among the states, when manufacturers of this kind obviously are not able to do more than struggle to survive a little longer before they disappear, as human effort always disappears when it is not needed to direct the force that can be got more cheaply from water or coal.
>
> But that is not all of the defendants' case. There are not twenty-five hundred men at present in the industry. . . . There were not men enough to enable the factories to run continuously during the working season, leaving out the two or three summer months in which the heat makes it impossible to go on. To work undermanned costs the same in fuel and overhead expenses as to work fully manned, and therefore means a serious loss. On the other hand the men are less well off with the uncertainties that such a situation brings. The purpose of the arrangement is to secure employment for all the men during the whole of the two seasons, thus to give all the labor available to the factories, and to divide it equally among them. From the view that we take we think it unnecessary to explain how the present system sprang from experience during the war when the Government restricted production to one-half of what it had been and an accident was found to work well, or to do more than advert to the defendants' contention that with the means available the production is increased. It is enough that we see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men.

The case was argued by Messrs. Pierre A. White and John W. Davis for defendants and by Solicitor General Beck for the Government.

Eminent Domain

The United States may condemn land for a new town site to replace town land flooded by a government irrigation project.

Brown et al. v. *United States,* Adv. Ops. 104, Sup. Ct. Rep. 92.

In 1921 Congress passed an Act authorizing the construction of a reservoir in Snake River Valley, Idaho, to be used for the irrigation of certain public lands. The project would involve the flooding of three-fourths of American Falls, a town situated in this valley. The Act therefore authorized the purchase or condemnation of suitable land for a new town site, such land to be conveyed to inhabitants of the town in whole or part payment for property lost to them by reason of the construction of the reservoir. The authorities selected an appropriate tract including plaintiffs' land, and, failing to purchase all of it by negotiation, brought this condemnation suit. From a verdict and judgment entered by the District Court of Idaho, plaintiffs brought the case by writ of error to the Supreme Court. Judgment was affirmed.

The CHIEF JUSTICE delivered the opinion of the Court. He said:

> The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object can not be regarded as for a public use of the property, and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. We concur in this view.

The learned Chief Justice made clear how the tract selected was the only practical and available substitute site for the town, an important community in a sparsely settled region. He suggested the analogy of land condemned by a railroad outside the right of way for borrow pits or dumps, and continued:

> The transaction is not properly described as the condemnation of the land of one private owner to sell it to another. The incidental fact that in the substitution and necessary adjustment of the exchanges, a mere residuum of the townsite lots may have to be sold does not change the real nature of what is done which is that of the mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to one exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the state, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution.

The United States brought a cross writ of error, objecting to the inclusion of interest from the date of the summons to that of the judgment in conformity with an Idaho statute. Distinguishing cases cited by the government, the learned Chief Justice said:

> In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damages arising from the inability to sell or lease after the blight of the summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings. It often happens that in the delays incident to condemnation suits the loss to the owner arising from the delay between the summons and the vesting of title by judgment is a serious one. The interest charge under the Idaho statute has the wholesome effect of stimulating the plaintiff in condemnation to prompt action.

Admitting that the conformity statute did not bind the Federal courts to follow the State statute in the matter of interest, he continued:

> But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take possession, interest allowed from the date of the summons is not a provision making for just compensation.

For the support of this position good authority was cited.

The case was argued by Mr. J. H. Peterson for

plaintiffs and by Special Assistant to the Attorney General W. W. Dyar for the United States.

Trusts—State Revenue From Federal Forest Reserve

School authorities have no standing to question the action of the county commissioners in apportioning funds received from Federal sources between the designated beneficiaries. In such cases the rule of equal division where proportions are not designated does not apply.

King County v. *Seattle School District No. 1*, Adv. Ops. 138, Sup. Ct. Rep. 127.

An Act of Congress directs one-fourth of all money received from each forest reserve to be paid to the State in which the reserve lies, "to be expended as the State . . . legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated." The State of Washington by statute turned its share over to the respective counties, to be expended "for the benefit of the public schools and public roads thereof and not otherwise." The portion thus received by King County was for certain years divided equally between schools and roads, but for six other years was entirely expended on roads. One school district then brought suit to have King County declared trustee of its share of the fund for these six years. The District Court denied a motion to dismiss, and a decree entered for the school district was affirmed by the Circuit Court of Appeals for the Ninth Circuit, but on further appeal, was reversed by the Supreme Court.

Mr. Justice Butler delivered the opinion of the Court. After holding that the District Court had jurisdiction, he pointed out that there was no limitation upon the power of the State to prescribe how the money should be used, and held that even if the monies were charged with a trust, the school district had no right to enforce it. He then said:

> The act does not direct any division of the money between schools and roads. Its language above quoted indicates an intention on the part of Congress that the state in its discretion may prescribe by legislation how the money is to be expended. No distribution to the appellee or any other school district is required. The public schools and public roads are provided and maintained by the state or its subdivisions, and the moneys granted by the United States are assets in the hands of the state to be used for the specified purposes as it deems best (citing case).
>
> The rule that, where a grant to two or more persons does not state the interest of each, their estates are presumed to be equal, does not apply. Under the Act of Congress it was competent for the legislature of Washington to authorize county commissioners to expend the money for public schools and public roads. Equal division annually between the two purposes is not required or contemplated by the act. The appellee has no standing to object to the distributions made by the county commissioners.

The case was argued by Mr. Howard A. Hanson for King County and by Mr. Henry W. Pennock for the school district.

Res Judicata—Estoppel by Judgment

A judgment allowing a composition in bankruptcy proceedings although opposed because of alleged false statements by the bankrupt, is not a bar to a subsequent action for deceit. But where the falsity was at issue in both cases the record in the former proceeding is admissible on the suit for damages and constitutes an estoppel by judgment on that question.

Myers et al. v. *International Trust Co.*, Adv. Ops. 100, Sup. Ct. Rep. 86.

When involuntary bankruptcy proceedings were pending against the Myers brothers, the International Trust Company, a creditor, opposed their offer of composition on the ground that the Myers brothers had obtained loans from it by misrepresenting their financial condition. The Referee found that no false statements had been made, and the composition was confirmed. Thereupon the Trust Company brought an action for damages for deceit against the Myers brothers. Defendants argued that the decree in bankruptcy was *res judicata* of the damage suit, and on the trial offered the bankruptcy record as an estoppel by judgment. The trial court excluded the record, and the Supreme Judicial Court of Massachusetts overruled exceptions. The Trust Company then brought the case by certiorari to the Supreme Court of the United States, which held that the bankruptcy judgment was not *res judicata*, but that the record should have been allowed in evidence. The judgment was accordingly reversed and the cause remanded.

The CHIEF JUSTICE delivered the opinion of the Court. After quoting from the case of *Cromwell* v. *Sac County*, 94 U. S. 351, to the effect that where the second action between the same parties is upon a different claim, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding was rendered, he said:

> Coming now to apply these principles to the case before us, it is very clear that the opposition to the composition in the bankruptcy court was not the same cause of action as the suit for deceit here. . . . The defense of *res judicata* as to the cause was therefore not established by the judgment confirming the composition.
>
> Counsel for the petitioners, however, urge that in spite of this the bankruptcy record was admissible in evidence. . . .
>
> This suit between respondent and petitioners was decided by the referee and the two courts against the respondent and the composition was confirmed because it was found that the statement of January 16th was true and not false. This is exactly the same issue which arose in the suit for deceit which is before us. Recovery of the judgment under consideration can not be sustained except upon the finding that the statement was false. The respondent, the Trust Company, cannot litigate again that issue in this case, because it is bound by the finding against it in its opposition to the confirmation of the composition. This follows necessarily from the rule in the second class of cases laid down by Mr. Justice Field in the language already quoted.
>
> An adjudication of bankruptcy, or of discharge therefrom, is a judgment *in rem* and is binding on, and *res judicata* as to, all the world, only in respect of the status of the bankrupt, and is not conclusive as to the findings of fact or subsidiary questions of law on which it is based except as between parties to the proceedings or privies thereto (citing cases). Here the International Trust Company was a real party to the issue and conducted the litigation. While the creditors whom it represented on the question of the discharge were only concluded as to the status of the bankrupt, it was estopped as between itself and the bankrupts in respect of the relevant facts determined in the controversy exactly as if the proceeding in opposition to the composition and discharge had been an ordinary civil suit by it against them.

The remainder of the opinion is devoted to a consideration of the case of *Friend* v. *Talcott*, 228 U. S. 27, which was distinguished because there

> the judgment confirming the composition and discharge . . . was not the same cause of action as that in the action for deceit . . . and therefore . . . it did not estop the creditor from obtaining a judgment in the latter suit, and, second, . . . the issue of the falsity of the statement, while essential to recovery in the second suit for deceit, was not essential to the judgment in bankruptcy as held by the court which rendered the judgment and was in fact not determined by that court. In the case before us, however, we find that the issue of the statement's falsity was the same and was controlling in both suits and that because it was decided against the Trust Company in the first suit, the decision concludes the issue against the

company in the second. It was error, therefore, to exclude from the evidence the record of the bankruptcy judgment on the composition.

The case was argued by Mr. Edward F. McClennen for the Myers brothers, and by Mr. John R. Lazenby for the Trust Company.

Practice—Appeals

To be reviewable by the Supreme Court a case must be not only final as to all the parties, but also complete as to the whole subject matter and as to all the causes of action involved.

Arnold et al. v. *The United States et al.*, Adv. Ops. 144, Sup. Ct. Rep. 144.

The Materialmen's Act of Aug. 13, 1894, as amended, requires penal bonds executed by contractors constructing public works for the United States to contain an obligation for the payment of all persons supplying labor and materials in the prosecution of the work. Any such person not thus paid may, after six months, bring suit on the bond in the name of the United States for his use and benefit. Any other creditor may intervene; all claims are to be enforced in a single action, tried in a single trial. Guimarin & Co. was a subcontractor on a contract Arnold had for the construction of a naval storehouse. The company was not paid, and began this action in conformity with the statute. Arnold and the Indemnity Company answered and denied their liability. Certain other creditors intervened, setting up their claims. The District Court directed a verdict for Guimarin & Co. for $7,693.31, and thereupon ordered the cause referred to a special master to report as to the claims of intervening creditors, and entered a judgment that the United States recover of the defendants the amount of the bond with costs. Before the order of reference was executed, Arnold and the Indemnity Company took a writ of error to the Circuit Court of Appeals for the Fourth Circuit. In this Court the intervening creditors did not appear. The Circuit Court of Appeals held that the defendants were liable on the bond for the amount found by the verdict to be due Guimarin & Co. and for such additional amounts as might thereafter be found to be due the intervening creditors, in an aggregate not exceeding the amount of the bond. It affirmed the judgment as modified in conformity with its opinion. The writ of error to this court then sued out was dismissed by the Supreme Court for want of jurisdiction.

Mr. Justice Sanford delivered the opinion of the Court. He said in part:

> If upon the ascertainment of the amounts due the intervening creditors, the aggregate amount of the claims of Guimarin & Co. and of the intervening creditors are less than the penalty of the bond it is adjudged that they will be entitled to recoveries for the full amount of their claims; but if the aggregate amount exceeds the penalty of the bond they can only recover under the express provision of the statute, *pro rata* of the amount of such penalty. In short, this judgment does not determine the ultimate amount which Guimarin & Co. may recover on the bond, the amounts which the intervening creditors may recover, or the amount of the ultimate liability of the defendants on the bond; it adjudicates neither the amount of the claims which are to be finally allowed against the fund created by the bond, nor the proportionate share of each creditor in such fund if inadequate to pay the amounts due all the creditors. . . .
>
> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction.

The cases was argued by Mr. William H. White for Arnold and the Indemnity Company and by Mr. Frank G. Thompkins for Guimarin & Co.

Practice—Appeals

A suit for an injunction by a seaman to enjoin the enforcement of certain regulations of shipowners as being in violation of Acts of Congress relating to interstate commerce, may not be brought to the Supreme Court by direct appeal.

Street et al. v. *Shipowners' Association of the Pacific Coast et al.*, Adv. Ops. 135, Sup. Ct. Rep. 119.

A seaman engaged in interstate commerce along the Pacific Coast asked the District Court for the Northern District of California to enjoin two associations of shipowners from enforcing certain regulations as interfering with the right of Congress to regulate interstate commerce. He brought suit in behalf of all seamen so situated. The rules objected to required all seamen to register and to receive a number which was printed in a book they were obliged to carry with them and present when signing articles. Jobs were assigned by rotation. These regulations were humiliating in the extreme, but seamen were obliged to comply with them in order to obtain employment. The court, however, held that the practices did not violate Acts of Congress and dismissed the complaint. Appeal was taken directly to the Supreme Court, and a motion to dismiss was there granted.

Mr. Justice McKenna delivered the opinion of the Court. He said:

> According to Section 238 of the Judicial Code, appeal or error may be prosecuted from the District courts when their jurisdiction is in issue; in prize cases; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty is drawn in question; in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.
>
> It is manifest that the present case falls within none of the enumerated cases, whether the regulations of the associations be regarded as an exercise of the power, which it is contended, Congress alone possesses, or which has been conferred upon the Shipping Commission, or be regarded as violations of the Anti-Trust Law.

In accordance with Section 238 (a) of the Judicial Code he ordered the case transferred to the Circuit Court of Appeals for the Ninth Circuit.

The case was argued by Mr. H. W. Hutton for the seamen and by Mr. Warren Olney for the shipowners.

The Lawyer and Political Sanity

"An observation made by Sir Edward Clarke at the dinner given by the Bar to Mr. Asquith on his appointment as Prime Minister in 1908, may not inappropriately be recalled. 'Democracy,' he remarked, 'always chooses its leaders from among the lawyers.' The formation of the present Government hardly, it is true, gives point to that saying. 'But,' Sir Edward Clarke continued, 'a well-trained lawyer may sometimes call himself a Radical, but he is never a revolutionist.' The legal element in the Labour Ministry, though comparatively small, is yet large enough to admit of that observation being recalled with satisfaction."—*The Law Journal*, Jan. 26.

THE CHANGING PROFESSION

In the Past Ten or Twenty Years of Social and Economic Change the Lawyers Have to an Unusual Degree Adapted Themselves to New Requirements, Helped to Guide the Transition Along Constructive Lines, and Served as Leaders of the Forward-Looking Thought of the American People*

By WILLIAM L. RANSOM
Of the New York City Bar

A GREAT deal has been said and written as to the effects of economic and social changes upon the law. I shall try to sketch some of the effects of these changes upon the lawyer.

Every period of economic and social readjustment brings a sharp challenge to the learned professions, especially the clergy, the teachers, and the Bar. In each epoch of drastic change, the newer forces find or fancy themselves confronted with the lawyers, and so set up a hue and cry about them as foes of progress, whose prestige and leadership must be overthrown if the aspirations of mankind are to be realized. When "the tumult and the shouting dies," however, and human affairs again resume their more tranquil course, it has always been found that the legal profession has survived what seemed a crisis, and has adapted itself handsomely to the changed conditions.

Ex-President Taft thus indicated nothing alarming or unusual when he declared, in the opening sentence of his book on the "Ethics of Service," that

> It is not too much to say that the profession of the law is more or less on trial.

The Bar is always very much on trial whenever anything important and far-reaching is taking place under a democratic form of government. And when Dr. Woodrow Wilson, then President of Princeton University, complained to the American Bar Association in 1910 that the lawyer was losing "his old function" and was allowing himself "to become part of the industrial development," it seems to me that he was giving way to pessimism prematurely, at no more than a preliminary stage of the change he saw in progress, and that he was losing sight of the ultimate factors on which the future of the law as a profession ever depends. Dr. Wilson's thesis of social prejudice against lawyers was not at all proved by the allegation that "the old order changeth," in the law as in everything else; the real question was and is whether the American lawyer meets and fulfills his part in the change and adapts his methods of doing business so that he may continued to play an honorable and useful part in the social fabric of the future.

Early Manifestations of Popular Hostility to the Lawyer

I wish time permitted at least a brief review of the violent manifestations of popular hostility to the lawyer, which have characterized periods of upheaval and transition in the past. Revolutionary forces in England, from Jack Cade down, usually sought first to kill the lawyers. They were a conspicuous target in the French Revolution. Many of the men who won independence for the American colonists and established the new republic urged seriously that liberty would not be secure unless, as a primary step, the legal profession was suppressed or abolished. If the initiative and referendum had been available in those days, the forces of hostility to the lawyers, led by men like John Adams, would probably have swept the colonies with a favorable vote on such a proposal.

The moral enthusiasts who agitated the slavery question until they forced it as a political issue, were loud in their arraignment of lawyers as the champions of a lawyer-made Constitution which protected property rights in human beings. They were utterly unable to foresee the time just ahead when a lawyer President and a Cabinet which shared with him the leadership of the American Bar would issue an Emancipation Proclamation and guide the Nation to a sound solution of this disrupting controversy. The jurist who now heads the Nation's highest Court saw the situation clearly a decade ago: The legal profession *was* "more or less on trial" then, and is so today; and no better tribute could be paid to the pivotal position of the legal profession in the world of affairs, than to say that it is, always has been, and always will be "more or less on trial," in any period of progress and accomplishment.

Less Denunciation and Distrust of the Lawyer Today

My topic today, however, deals with the present development of the law as a profession, not with past criticism of it; but if you wish to get a better perspective as to the present, you need only to read such works as Charles Warren's "History of the American Bar," Mr. Beveridge's "Life of John Marshall," Charles Francis Adams' "Three Episodes of Massachusetts History," certain of the novels of Charles Dickens, or Pollock and Maitland's "History of English Law." It is, however, within the scope of my subject to submit to you this pertinent observation, and to invite your consideration of its accuracy and of the reasons for its truth:

In the present period of radical and, in some respects, revolutionary change, in the United States as throughout the world, there seems to be less of denunciation and criticism of the lawyers than in any similar period in our history.

If this statement is true, and my reading of the annals of the Bar convinces me that it is, then I suggest that it may be explained only by a conclusion that:

In the past ten or twenty years of transition, the lawyers of America have, to at least an unusual degree, adapted themselves to the changed conditions, have met the changing requirements, have helped to guide the transition along constructive lines, have served as leaders of the forward-looking thought of the American people, and have been in no sense mere obstructionists or adherents of "things as they are."

Prevailing Trend of Changes in the Profession

My theme this morning is along the lines of an amplification of the statement just made, particularly

*The annual alumni address delivered before the Cornell University College of Law and the annual meeting of the Cornell Law Association.

as to the changes which have taken place in the profession to enable its members to perform more acceptably their traditional tasks. I am aware that I am venturing into a field where it is dangerous to try to generalize. What I shall try to sketch are *types and tendencies* which seem to me to represent the prevailing trend. They are by no means universal in application or realization. Many of you will promptly point out that the changes to which I refer have not yet taken place everywhere and have not been fully realized anywhere. Nevertheless, some discussion of the *trend* of these readjustments may be of interest to the undergraduates of the College of Law; and the members of the Alumni present will perhaps be lenient if I travel over ground familiar to them, in an effort primarily to say something of aid and interest to those who soon will be numbered in our ranks.

The Lawyer and His Training in Earlier Days

In the first place, let us look the facts in the face as to the legal profession as it was, and as to the changes now in progress in the profession under the pressure of economic and social readjustments. Who and what was the lawyer down to a comparatively recent time? Too commonly he had selected and entered the profession, not because of superior cultural training or any moral training at all, but because he had early manifested a certain readiness in argument and smartness in handling himself. The average parent, on the farm and in the early industries, aspired that the heritage of his sons should be something more than the physical toil of the pioneer. If a boy was alert, smart, glib, and showed an early aversion to manual labor, this was thought by many to fit him for the law.

Too often these preliminary qualifications were all the boy possessed, and there was no weeding-out process at all. If he wished to become a member of the Bar, there was no obstacle to prevent the attainment of his desire. The reading of a few law books, a motion before the Court, an available desk in a lawyer's office in exchange for menial or clerical services, and the youth of nimble wit was a member of the Bar, ready to receive clients and ready to *begin his legal education*—at their expense! The young men of the law schools, who often feel that present-day educational requirements prevent the young lawyer from beginning practice as early in life as was formerly the case, overlook the fact that, in the pioneer days, the lawyer's education in his profession too commonly *began* with his admission to the Bar. Nowadays the graduate of a college and law school is much further along in his professional development when he is admitted to the Bar; and this fact is increasingly, though tardily, recognized in the rates of compensation paid to the newcomers in the profession.

During the earlier years of the American Bar, the conditions precedent to admission were only an index or reflex of the conditions subsequent. The emphasis was considerably upon the criminal law; and the lawyers were looked upon, in Phillip Guedalla's cogent phrase, as "the unclean instruments appointed by Providence for compassing the acquittal of the guilty." On the civil side, the practice of the law was principally a matter of appearing for one side or the other in neighborhood disputes. It dealt with the heartaches, the pettiness and the avarice of mankind, and the lawyer's spear knew no brother. Law suits were looked upon as a duel of wits, a game to be played sharply and savagely. It was the era of what Dean Wigmore has called "the sporting theory of justice." The premium was put on cunning, trickiness, and skill in what came to be known as pettifogging. The young lawyer rarely had received any training or guidance which would teach him any other philosophy of the profession. The Bar had not even begun to marshal its forces to teach initiates any other precepts.

The Lawyer Was Litigious Rather Than Constructive

The lawyer lived on local controversies, the disagreements of neighbors, the grasping and acquisitorial designs of the more unscrupulous. Because discord and dissension prospered him, the lawyer often gave grounds for John Adams' charge that "he foments more quarrels than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself." The idea that a lawyer might avert trouble and dissension, make human affairs run more smoothly and prosperously, and be a creative constructive factor in the business life of the community, was almost unknown.

The average lawyer knew less of business than he did of the law and professional ethics. Business men felt that the great tragedy of their lives was any circumstance which compelled contact with lawyers and litigation. Laws were casually framed and often casually interpreted, in each jurisdiction. To try to carry on business in more than one State involved the business man in a labyrinth of uncertainty and conflicting rules. Even as to the most common forms of business transactions, the law varied widely from State to State—a variance which destroyed certainty as to legal rights. This deplorable condition was created by the lawyers of that day, and was often, I fear, deliberately perpetuated by them. The difficulties to which it gave rise constituted a part of their stock in trade, their means of livelihood.

The Pioneer Lawyer in Politics

The law was then the ready stepping-stone to politics; hence most lawyers went into public office, carrying with them much of the point of view they had developed in their profession. The lawyer was bound to be pre-eminent in the deliberations of the town-meeting and in the manipulation of the caucus. He largely monopolized public office, and too often used it for private ends, incident to his law practice. This created further prejudice, as well as natural jealousy, on the part of less glib and skilful public speakers. If a lawyer felt within him any stirrings of constructive or statesmanlike impulses, such impulses led him straight to public office; and it never occurred to him, or to anyone else, that a lawyer could be a constructive statesman in the field of private industry.

In such a state of the profession, the elements of delay, technicality, sharp practice and oppression, were emphasized in the practice of the law. The triumphs of litigation were looked on as available only "to the longest purse"; and legal forms and precedents were regarded as instruments of delaying and defeating justice according to the common sense of right. An early commentator characterized the lawyers and their methods as

> an abundance of cobweb subtleties, spun so very fine by the *spiders of the law*, that one would think it done on purpose to let justice fall through.

It Is Surprising Only That Greater Disrespect for the Law Did Not Develop

Of course I have indulged in generalizations which are dangerously broad, and which might be re-

futed by many glorious exceptions which will readily occur to you. I do not wish to leave with you any impression of lack of respect for those rugged and outstanding men who implanted the fundamentals of Anglo-Saxon jurisprudence in the new land, and made the arbitrament of law-governed tribunals the very corner-stone of the republic. All honor to the pioneer lawyers of America, but we may as well understand frankly the conditions under which they lived and practiced law. But I do not think I have stated inaccurately the layman's impressions of lawyers as a class, during the last century; and I am sure I have not described inaccurately the lack of legal, cultural and ethical training which usually *preceded* admission to the Bar and the undertaking of professional services for clients.

Under such conditions, the surprising thing is not that there was much disrespect for the law and for lawyers, but that there was not more. Only the deep-rooted moral traditions of our early settlers and the diligent efforts of the seniors of the Bar to guide and aid the young men who were trying to "read law" in their offices, tended to bridge the deficiencies of training and avert a greater disapprobation.

Present-day Changes in the Practice of Law

For better or for worse, radical changes under the compulsion of economic and social readjustments have generally taken place, or are taking place, in the practice of law; and, while they are deplored and viewed with alarm by some, I am unable to regard them with any unqualified pessimism. The era of the line-fence lawsuit has gone forever from the law. The severest critic would not call the chronicle of *Jarndyce* v. *Jarndyce* typical of the practice of law today. A better system of adjusting the compensation of employes for industrial accidents has driven the specialists in personal injury litigation to seek other and usually broader fields for their talents. The searching of real estate titles and the handling of many matters pertaining to real property have largely been taken out of the fields of chance and casual determination, and so away from the general practitioner, through the development of official systems based on the Torrens Act, or through the growth of specialized institutions which place financial guaranties back of their determinations.

The enlargement of the investigating staffs of the prosecuting attorneys and the introduction of administrative adjuncts in the work of the criminal courts have minimized the participation of defendants' lawyers in the processes of determining guilt and proper punishment. Especially in the larger cities, the fact of guilt or innocence is ascertained administratively, before indictment; and, in a large proportion of the cases involving other than major crimes, a plea of guilty or a conviction follows in an unspectacular course. This development has largely deprived the criminal law of its one-time theatric attractiveness for the lawyer of forensic skill.

The expansion of trade and commerce has brought great pressure to bear for Nation-wide uniformity in the statute law and its interpretation, in all matters pertaining to the conduct of modern business, so that the lawyer no longer is the beneficiary of the traps and pitfalls inherent to the uncertainties of the old regime. His outlook on commercial and corporate law in its relationship to business enterprises has become as broad as the Nation itself—no longer local and petty.

Appearance in Court is no longer the ambition or the chief avocation of the average lawyer. Litigation of the type which prevailed during the reign of "the sporting theory of justice" is now avoided as eagerly by the lawyer as by the client; and in its place there has come a multiplicity of new and absorbing relationships and services, along lines unthought-of twenty-five years ago.

Complaints of Those Who Regret the Changes

Those who lament these changes complain

(*1*) *That the lawyer is permitting himself to be drawn into and made a part of industrial and business activity, and is becoming its servant;*

(*2*) *That the law is coming to be practiced by organizations, rather than by individuals; and that consequently, the lawyer is losing his individualized professional status and his forensic primacy;*

(*3*) *That the lawyer remains a champion of "things as they are," instead of becoming an advocate of improvement and a helpful factor in the course of new movements.*

Different Aspects of the Economic and Social Changes Which Have Influenced the Law as a Profession

The extent to which these assertions are well-founded in fact, and the extent to which, if true, they constitute cause for regret, can be determined only by an analysis of what is taking place. Three different aspects of the economic and social changes in progress may be enumerated as having, among others, led to changes in the law as a profession:

(*1*) *The shifting of emphasis from litigation and legislation to administration;*

(*2*) *The shifting of emphasis from political changes (i.e., those affecting the structure of government) to economic and social problems;*

(*3*) *The transition in industry from the era of warfare between great captains of business, owning and controlling large enterprises personally, to an era of wide-spread popular ownership and control of such enterprises.*

Our discussion of these changes and their effects upon the lawyer in his profession may well be aligned with the three grounds of complaint above-summarized:

(*1*) *Is it regrettable that the American lawyer is permitting himself to be drawn into and made a part of the industrial development?*

When constitutions are being formulated or changed, the leadership of the lawyer is beyond challenge. Tasks of legal draughtsmanship leave the layman in the ante-room. When business and economic problems press insistently for solution, the lawyer is left outside, unless he has mended his ways from yesterday and has learned something about such problems. The developments of the past twenty years have compelled the lawyer to learn business, industry, commerce, social relationships, in all their phases, or else to find his income, as well as his leadership and usefulness, much impaired. Confronted with this imperative choice, the present generation of lawyers has generally risen to the needs of those it seeks to serve, in public office or in private practice.

The Lawyer and the Regulatory Activities of Government

It is touching on familiar ground to refer to the growth of administrative agencies whose activities have proved a fruitful field for the lawyer's talents, and have made the lawyer more indispensable to his client than ever before. Every industry and every business

comes in contact with governmental departments, Federal, State, and municipal, in a multitude of phases. According to figures recently published, one person out of every twelve in the United States, over sixteen years of age, is an employe of some branch of government; and practically all of these departments of government are engaged in taxing, inspecting, supervising, auditing, or otherwise regulating, the conduct of business by private enterprise. The capital fact in the development of our democratic government is the multiplicity of regulations by administrative agencies. A curious twist of the present day mind is that the same individual who covets and seeks freedom and opportunity for himself, insists vehemently on interference with the business and activities of everyone else!

The new regulation is of the most microscopic kind. It involves the closest analysis of accounts, processes, practices, methods or marketing, relations to the public, relations to patrons, relations to trade rivals, and the like. Regulation always involves an investigation and determination, and then sometimes negotiation and adjustment, and oftentimes review or resort to Court for the correction of errors or the protection of substantial rights.

All this compels the participation of lawyers on *both* sides, from the first step (if it is to be prudently taken) to the last. The possibility that need for review may arise must be kept ever in mind, and that means the *services of lawyers at every stage*. This development means several things which I think may well be noted by young men engaged in the study of the law:

New and Useful Field for Professional Service

In the first place, here are new avenues and vistas of professional service, which many will find more fascinating and useful than the available opportunities of the old regime. The legal problems incident to regulation deal with *today* and the *future*, not with yesterday's disagreements. They deal with problems of policy for years ahead, problems which will vitally affect the happiness and prosperity of many thousands of persons and the success or failure of great enterprises. I do not disparage the services of the lawyer in the law-suit involving, for example, the outcome of a horse-trade or the conformance of 637 shirt-waists to sample. It is elementary that all such controversies ought to be determined justly and accordingly to law, if other processes of adjustment fail. My present point is only that the relationship of government to industry affords a new and broadening field for a very interesting type of professional work—a kind of work which requires vision, imagination, creative and constructive ability, *and a sound sense of the economic and social relationships of every legal question arising.*

In the second place, this newer field of activity has opened the possibility of useful careers to thousands of the younger lawyers who wish to spend at least some part of their lives in public, rather than private employ. For many years, it has been one of the great tragedies of democratic government that the law business of governmental agencies has too often been done in an inefficient, slovenly and demagogic fashion, whereas these departments ought to have at least as competent and well-paid legal advice and assistance as is available to private enterprises. Modern regulation means thousands of lawyers on the public payrolls; and appointments to these positions are now, to an increasing extent, made on the basis of merit and qualifications, rather than mere political connections. Tenure in office is likewise divorced more and more from political considerations. I doubt if any young lawyer should look forward to spending his lifetime or maturity in a public law office, or in serving any other single client; but there is both opportunity and need for competent, courageous, fair-minded professional work, in the countless legal positions under modern regulation, where the public law officer is vested with tremendous powers.

In the third place, to render competent professional service in connection with present-day regulation, taxation, and the like, requires that the lawyer fit himself fully for the task, whether his retainer come from the governmental agency or from the private interests affected thereby. A lawyer cannot render service in this field, or in the domain of business generally from any detached relationship; knowledge of law, as such, is of secondary importance in such a task. The prime quality needed is power and willingness to think, ability to grasp things quickly, to marshal them effectively, and to state them clearly. Those are the qualities which make the lawyer indispensable to business, in dealing with present-day problems of regulation and taxation; and it is obvious that a lawyer cannot serve a client effectively in such a field unless he knows intimately the industry or business he is trying to aid and protect, *and knows also the fundamentals of sound economics and public policy*, which will enable him to avoid a fallacious or short-sighted view of his clients' real interests. In my opinion, a young lawyer today can gain nothing more valuable and indispensable, from his college and law school education, than an ability to analyze clearly and think honestly, soundly and *independently*, on economic subjects, because this alone can give him the proper back-ground for the more intimate knowledge of business and industry which is forced upon him as he undertakes service for his clients.

The Broader Training and Vision Required of the Lawyer

So it comes about that the present-day lawyer learns engineering from the engineers, studies industrial chemistry with the laboratory staff, studies accounting with the auditors, knows the books almost as well as the bookkeepers, grasps the elements of financing problems, familiarizes himself with salesmanship until he can talk the jargon of the salesman and see his problems with a common eye, and so on, through the various departments of the business of each of his clients. *Knowledge of the statutes and of the legal principles is not enough.* The business man cannot take the time to educate or inform his lawyer as to all the ramifications of his business every time he asks advice by telephone in the midst of a pending situation. The lawyer has to *know the business*, each business he serves, know its practical and accounting aspects, know the sources and transportation routes of its raw materials, know the competitive conditions of its markets, know the changing financial conditions which affect the terms on which it can obtain money, know these things and many others, with a good deal of thoroughness; and it is on the basis of such a grasp of the administrative problems, that the lawyer gives advice and helps formulate decisions and policies, along lines four-square with the law.

In other words, the present-day lawyer, with the independence and the breadth of experience and outlook which comes from contact with many business and commercial enterprises, has become an essential part of the expert staff of each of them. The old type

of lawyer was called in when the corporation was sued or some of its officers were indicted. The modern type of lawyer is not *called in* at all; he *is in*, all the year round, not to deal with suits and assessments and regulatory orders that have already been inflicted, but to help shape the course of things so that they will not be inflicted. His service is anticipatory and preventive, rather than subsequent and surgical.

Through the maze of problems which may arise as to regulatory and tax matters, for example, his function is to deal with the course of business throughout the year in such a way that the record is straight and clear, when tax reports have to be made out or the accountants appointed by the regulatory body come in, seeking to find matters for criticism or directive orders. Take, for another illustration, the varied questions which arise as to unfair practice, under the Clayton Act and the Federal Trade Commission Act. Practical assistance can be given as to these questions only by a lawyer who knows the administrative conduct of business and the workings of the administrative machinery of regulation. Sound advice can be given as to these questions only by a lawyer who has "thought out" the proper relationships of government to business and who knows the economic principles on which human happiness and industrial stability depend. The lawyer of fifty years ago possessed none of the broad training and little of the legal philosophy which are required for professional service in this field today.

The Lawyer Is More Efficiently Meeting the Requirements of His Time

So, in an age when the emphasis has shifted from litigation and legislation to administration, the lawyer has met the requirements of his time. From a secure, and even an improved, position in the law as a profession, he has gained knowledge of administration and of business, and has become an essential factor in shaping and guiding the public relationships of modern business. He has become *a constructive and creative statesman*, not merely a litigator living off some one else's misfortunes!

Thus it naturally came about, several years ago, that lawyers were invited to advance from the ranks of the profession into great administrative positions—men like Judge Lovett, as head of the Union Pacific System; Judge Gary, as the head of the United States Steel Corporation; Dwight Morrow, as a partner in Morgan & Company; Jackson Reynolds in the banking field, and Mr. Baker's enterprises; Judge Beattie in the Texas Oil Company; Gerhard M. Dahl in transportation reorganizations, and others who might be mentioned. In this connection, I think it may accurately be added that, at the present time, such invitations to turn from the law into the administrative positions of modern business, are much less frequently accepted than tendered. The lawyer finds in his professional work a full employment for his creative talents, and at the same time an independence and a breadth of contacts which he could not find in the service of a single industry, however large.

A further demonstration of this useful development in the profession may be found in the fact that the same Woodrow Wilson, who complained so bitterly in 1910 that the lawyers were permitting themselves to be drawn into industry and commerce, himself selected *lawyers*, in 1917 and 1918, during the Nation's supreme need, to undertake almost every administrative and business task on whose efficient execution the future of civilization was deemed to depend. The administrative head of the War Department (Mr. Baker) was a lawyer; the Secretary of the Treasury (Mr. McAdoo) and the Director-General of Railroads (Mr. McAdoo and Mr. Hines) were lawyers; the head of the great Interior Department (Mr. Lane) was a lawyer. The creation of the civilian army and the administration of the Selective Service Law were literally turned over to the American Bar, with a distinguished lawyer (General Crowder) as Provost-Marshal. The Commander-in-Chief of the American Army in France (General Pershing) was a member of the Nebraska Bar. I have not nearly exhausted the list of lawyers chosen by President Wilson as best fitted for great administrative posts, and I am not commenting upon the merits of any of his selections. My present point is only that his chief ground of complaint as to lawyers in 1910 became the chief reason for choosing them for all-important posts in 1917 and 1918.

Is There a Decadence of the Statesmanship of the Bar?

Some persons acclaim, and some regret, what has seemed to be latterly a certain relative disappearance of the lawyer from Senate and House, from the Cabinet, and the more important administrative posts. There is talk of a decadence of the statesmanship of the Bar—its constructive leadership in public affairs and also in the development of new legal systems. As to the first of these, can there be ground for such a criticism in the generation of Root, Hughes, Taft, Olney and John W. Davis? As to the second, it is true that the creative role of lawyers is not now related primarily to codes or legal systems. The profession has not latterly produced a Grotius, a Papineau, a Pothier, Savigny, Mansfield or Marshall. In an age when the public emphasis has shifted to economics and industrial problems, and away from changes in Constitutions and legal systems, it is at least temporarily true that, for better or for worse, the creative and constructive talent of the lawyer is being largely expended now in the guidance of the great democratically-owned industrial and public-service enterprises of the country. The lawyer has only bended to the prevailing tendencies of his times.

The Transition in the Relationship of the Lawyer to Private Industry

The American Bar is not made up primarily of the lawyers identified with gigantic corporate enterprises. The real quality of our Bar ought to be judged by the tens of thousands of men who live in the cities and towns scattered throughout the country and serve faithfully and diligently the countless business and commercial enterprises which are "the actual backbone" of industrial America. Unfortunately our Bar is often judged by a relatively-few and widely-known lawyers, in the largest cities, and I shall advert to the changes in their status, because it is probably the ambition of most young men in the law schools to attain some day that supposed elevation.

I have already referred to the transition which has taken place from the era of sharp struggles for control of industry and of transportation lines, between great "captains of industry and finance." During that period, the lawyers sat at the elbow of a Harriman, a James J. Hill, a Frick, a Baer, or

(*Continued on page 131*)

ANNUAL AND SPECIAL LONDON MEETING

American Bar Association Will Meet at Philadelphia on July 8, 9 and 10 Instead of Date Previously Announced—Committee Busy With Arrangements for Annual Gathering—Travel and Other Information for Prospective Pilgrims to London—Committee Appointed on Other Side

THE Committee on Program and Arrangements for the next annual meeting, pursuant to the authority delegated by the Executive Committee, has advanced the date for holding the annual meeting at Philadelphia one day. It will therefore be held on July 8, 9 and 10, instead of July 9, 10 and 11, as originally announced. The change was due to various considerations of convenience. For one thing, it will give those members of the Association who intend to go on the London trip plenty of time in which to get aboard after the conclusion of the regular annual meeting, and will thus enable them to participate in the final proceedings of the regular meeting without feeling they are likely to be rushed for time. It is understood that the subordinate and auxiliary bodies which meet in connection with the annual meeting will have no difficulty in accommodating themselves to the new date.

The Committee on Program and Arrangements, in accordance with the usual rule which was reaffirmed at the recent meeting of the Executive Committee in Philadelphia, consists of the President, Secretary and Treasurer. These gentlemen are not only busily engaged at present in making the necessary physical arrangements for the meeting, but are also preparing a program which will certainly not be inferior to any which the Association has heretofore presented. There is a great deal more detail in the work of program making that is generally imagined, but the committee expects within a reasonable time to present a list of distinguished speakers who should make the Philadelphia meeting particularly notable. In this connection, one of the interesting additions to the annual meeting will be an exhibition of the remarkable collection of Blackstoniana and other legal material which has been gathered by Hon. Hampton L. Carson of Philadelphia, former President of the American Bar Association, during the last forty years. This mass of material is regarded as unrivalled by any collection of the sort on either side of the Atlantic. For instance, the history of the Inns of Courts, which will be objects of particular interest to visitors to London, is said to be more fully illustrated by the books and papers, documents and original manuscripts and portraits which Mr. Carson has collected, than by anything that can probably be seen in the Inns of Courts themselves.

Interest in the special London meeting continues unabated. As announced in the November and December issues, this special meeting is to be held in response to an invitation of the Bar and Law Society of England extended last year, and accepted at the Minneapolis meeting last August. Following that meeting, a special Committee on Arrangements and Transportation was appointed by President Saner This committee, after conference with various steamship lines selected the Berengaria, the largest and one of the best appointed steamers of the Cunard fleet, providing first-class cabin accommodations for nine hundred persons, to carry the Bar Association delegation to London. Announcement of the arrangement was followed by numerous applications for reservations, all of which are receiving due attention. The pilgrims to London will leave Philadelphia at the conclusion of the regular annual meeting and sail on the Berengaria on July 12, arriving Saturday, July 19. The special meeting will be held in London during the week beginning July 20.

Inasmuch as the American Bar Association is to be the guest of the British Bar and Law Society, the principal part of the arrangements for program and entertainment must naturally be left to the hosts on the other side. The special American committee on program appointed by President Saner, will see to it that those who speak for the American bar will be fully representative of all that is best in the profession in this country. In this connection it may be stated that the members of the Canadian Bar Association, who are to act as joint hosts in the entertainment of the American Bar Association, will sail on the C. P. R. Steamship "Montlaurier" on July 8, arriving in London the afternoon or evening of July 16, several days in advance of the American Bar Association party.

The following extract from the *Law Times'* report of the remarks of Sir Douglas McGarel Hogg at the recent annual meeting of the Bar in Inner Temple Hall, Friday, Jan. 18, on the approaching visit of the American lawyers, will doubtless prove of interest:

"The other matter he wished to refer to was the forthcoming visit of the American Bar to this country in July. It was a matter which was initiated by his predecessor, the present Master of the Rolls, and which, if reports were true, was likely to be consummated by his successor in office. He (the Attorney-General) had only been the temporary ghost on the stage, who had passed on the invitation before it had reached fruition. That association was, it was hoped, coming to England about the 20th of July. It would be remembered that the proposal was started about eighteen months ago, and the suggestion was made that it would be a good thing if the American Bar, which every year held a general meeting at some place in the United States, would so far depart from its usual practice as to hold one of those meetings in this country, which, after all, was the birthplace of American, equally with our own law. He was quite sure that it was also a great satisfaction to everybody to know that the suggestion had been accepted, and that the American Bar was coming to England this year. He had thought it right, inasmuch as in the United States the two branches of the Profession were amalgamated, to ask the Law Society whether they would associate themselves with the invitation, and he was glad to say that they had willingly done so, and that the president of the Law Society had cordially joined in the invitation with himself. In connection with that it had been suggested that the Canadian Bar should be included in the invitation. He thought that if they

invited their cousins across the ocean it was only fit that they should obtain the cooperation of their still nearer kinsmen in Canada. The Canadian Bar was to join with the English Bar as joint hosts. The latest information he had was that something like 150 or 200 members of the Canadian Bar were likely to come over and to assist in entertaining the visitors from the United States. The exact number coming from the United States was uncertain, but, as they had chartered a very large ship, it looked as if the number would be 700 or 800, and consequently an influx might be expected of something like 1,000 visitors from the other side of the Atlantic to meet the Bar during July. He was quite sure that all connected with the Profession would cooperate in making the visit a success."

We reprint in this issue the travel information issued by the Special Committee on Transporation for the London trip, which appeared in the January issue of the JOURNAL. Prospective travelers will probably find that it answers most of their questions.

Travel Information

STEAMSHIP RATES TO ENGLAND

The steamship rates are as follows:

Berengaria and Aquitania

Inside rooms, $270 per passenger.

Inside rooms with bath, toilet or shower, $50 per room extra.

Outside rooms, from $280 per passenger.

Children under 10 years of age, half fare ($135 minimum).

No stateroom will be sold to one adult and one child for less than two full fares.

Laconia

Approximately 20% less than the above.

RETURN PASSAGE FROM ENGLAND

The Cunard Steamship Company will allow a reduction of 33 1/3% from their published rates for return passage on any of their vessels sailing on or prior to August 15th, and 10% for return passage between that date and September 15th. These reductions, however, cannot be applied so as to reduce the price of passage below the published minimum rate.

SAILING DATES TO ENGLAND

Berengaria (52,100 tons) Sails Saturday, July 12th; arrives Saturday, July 19th.

Laconia (20,000 tons) Sails Saturday, July 12th; arrives Sunday, July 20th.

Aquitania (45,647 tons) Sails Wednesday, July 9th; arrives Tuesday, July 15th.

WHAT THE RATES INCLUDE

The rates given herein include transportation from New York to Southampton on the *Berengaria* and *Aquitania* and to Liverpool on the *Laconia*, meals aboard the ship—in fact, all expenses of the trip from New York to the ports named, except the usual gratuities to the stateroom and dining salon stewards, stateroom stewardesses and other steamship employes. The railroad fare from the port of destination to London is not included. The fare from Southampton to London is approximately $4 per passenger and from Liverpool to London approximately $8 per passenger.

TRAVEL IN EUROPE

The Committee in charge will not attempt to arrange for travel anywhere in Europe after the meeting in London. The Committee recommends Messrs. Thomas Cook & Sons, 585 Fifth Avenue, New York; Raymond & Whitcomb Company, 225 Fifth Avenue, New York; American Express Company, 383 Madison Avenue, New York; Lifsey Tours, Inc. 1472 Broadway, New York; George Marsters, Inc., Washington Street, Boston, Mass.; Temple Tours, 65 Franklin Street, Boston, Mass., as reliable travel agents, any of whom will be glad to furnish definite information as to travel, rates, etc. Members who desire to tour by automobile may arrange for automobiles through any of these travel agencies or through the New York office of Daimler Hire, Ltd., 244 Madison Avenue, New York.

No attempt will be made to return in a body.

Members of the Association may be accompanied by members of their families. No assurance can be given of accommodations for non-members who are not members of the families of members, although if a member desire to be accompanied by non-members who are not members of his family, an attempt will be made to arrange such accommodations on either the *Aquitaia* or the *Laconia*.

PAYMENT FOR STEAMSHIP ACCOMMODATIONS

As each reservation is confirmed by the Cunard Steamship Company, the member making the reservation will be called upon to make a deposit of twenty-five per cent (25%) of the price of the accommodation reserved and will be called upon to make the final payment of the balance within a reasonable time thereafter. Tickets will be issued immediately upon payment of the final installment.

Each member taking the trip should arrange at once for his return passage. Any of the travel agencies recommended will be glad to attend to this matter for you, if you do not desire to make your arrangements for your return passage directly with the Cunard Steamship Company.

HOTEL ACCOMMODATIONS

Members are free to make their own arrangements for hotel accommodations in London. The Committee itself can assume no responsibility respecting hotel accommodations but it has arranged with Messrs. Thomas Cook & Sons to engage hotel accommodations for members desiring to make their reservations through them.

Members who expect to attend the London meeting are requested at once to make application for steamship reservations to Frederick E. Wadhams, 78 Chapel street, Albany, N. Y., in case they have not already done so.

Mr. J. Whitney Coupland, for many years associated with the Cunard Steamship Company, and who is now its General Traveling Passenger Agent, will accompany the American Bar Association on the trip to London.

Mr. Coupland is giving his personal attention to the care of our party and will be glad to place at the disposal of our members the great fund of information gained by him during his years of experience in European travel.

Meeting of Commissioners on Uniform State Laws

The Commissioners on Uniform State Laws will hold their 34th annual conference at the Bellevue-Stratford Hotel, Philadelphia, Pa., July 1st to 8th, 1924. Members are advised to make their reservations early. GEORGE S. BOGERT, Secretary.

Second Annual Meeting of the American Law Institute

THE Second Annual Meeting of the Institute will be in the Auditorium of Continental-Memorial Hall, Seventeenth and D Streets, Washington, D. C., on Saturday, February 23.

Objects of the Meeting

Since the Organization Meeting of the Institute last February, a gift of more than one million dollars to carry on the work of restating the law along the lines indicated in the Report to the Organization Meeting has been received. On June 1, the work on the Restatement of the law was begun. Four persons called "Reporters" who are primarily responsible for the production of the drafts of the restatement on different topics have been appointed: Mr. Samuel Williston, of Harvard, as Reporter for Contracts; Mr. Joseph H. Beale, also of Harvard, as Reporter for Conflict of Laws; Mr. Floyd R. Mechem, of the University of Chicago, as Reporter for Agency; and Mr. Francis H. Bohlen, of the University of Pennsylvania, as Reporter for Torts. Besides these Reporters there are eighteen legal advisers and a number of assistants. Considerable progress has already been made and a principal object of the meeting is to enable those who attend to obtain from the members of the Legal Staff who are doing the work and also from questions and informal discussion a clear understanding of the way in which the work is being carried on, and some of the more important problems connected with the form and content of the Restatement.

Dean Roscoe Pound of the Harvard Law School will submit his Report and Recommendations on Classification, and it is also hoped that the Report and recommendations of the Committee on a Survey and Statement of the defects in Criminal Justice will be completed in time to have this interesting subject presented for discussion by the Honorable Herbert S. Hadley, Chairman of the Committee. A number of amendments to the by-laws, proposed by the Council of the Institute, will be considered; among them an amendment limiting the number of life members not also official members to five hundred. Another amendment, if adopted, would drop from the membership any member who does not attend any meeting of the Institute during two consecutive years.

Provisions for the Entertainment of Members

It will be noted that the program provides for a reception by the Council at the New Willard the evening before the Meeting and a reception at the White House by President and Mrs. Coolidge, at 5 p. m., on Saturday, immediately after adjournment, and a dinner in the evening at which the Chief Justice will preside and the Secretary of State, Judge Benjamin N. Cardozo of the United States Court of Appeals of New York, and the Honorable Atlee Pomerene of Ohio will speak.

Character of the Gathering

The membership of the Institute, though limited, is composed of the leading judges, lawyers and law teachers of the United States. The Organization Meeting last February was in many ways the most representative gathering of the bar, in the best sense of that word, that has ever taken place in the United States. The general public approbation and the large financial support which the Institute has received, the good start that has already been made on the monumental task of giving more orderly expression and thereby greater certainty and simplicity to the Common Law, as well as the interest of the specific subjects which will be discussed at the meeting will, doubtless, secure an equally representative gathering for the Second Annual Meeting of the Institute.

Program of the Meeting

FRIDAY, FEBRUARY 22

9:30 P. M.

Informal reception of members by the Council in the main downstairs room of the New Willard.

SATURDAY, FEBRUARY 23

(All meetings in Continental-Memorial Hall; luncheon at the building of the National Red Cross, Seventeenth and D Streets.)

9:30 A. M.

Registration and assembling of members.

10:30 A. M.

1. Address of President.
2. Report of Director.
3. Statements by the Reporters of the progress of the work on their respective topics. (Opportunity to be given to ask questions from the floor of the Director and the Reporters.)
4. Report of the Committee on Amendment to the By-Laws and action on its recommendations.
5. Report of the Committee on New Members of the Council and action on its recommendations.
6. Consideration of the Report and Recommendations of Roscoe Pound on Classification. (Discussion to be opened by Dean Pound.)
7. Consideration of the Report and Recommendations of the Committee on A Survey and Statement of the Defects in Criminal Justice. (Discussion to be opened by Herbert S. Hadley, Chairman of the Committee.) It is hoped that this Report will be ready for the consideration of the meeting.

1:00 P. M.

The meeting to adjourn from 1:00 P. M. to 2:15 P. M. for luncheon in the building of the National Red Cross.

5:00 P. M.

Reception at the White House by the President and Mrs. Coolidge.

7:00 P. M.

Dinner at the City Club, 1320 G Street. Presiding Officer, Chief Justice of the United States. Honorable Charles E. Hughes, Honorable Benjamin N. Cardozo and Honorable Atlee Pomerene will speak.

Headquarters

On Friday, February 22, headquarters will be open from 9:00 A. M. to 10:00 P. M. at the New Williard Hotel.

On Saturday, headquarters will be transferred to Continental-Memorial Hall, and will be open from 9:00 A. M. to adjournment.

Litigious India

"One interesting fact which the Judicial Committee's list scarcely ever fails to disclose is that India is the most litigious part of the King's Dominions beyond the seas. Of the twenty-eight appeals awaiting hearing by our Imperial Court of Appeals —which will resume its sittings on Tuesday—no fewer than nineteen are from the Indian courts. Canada contributes but three cases to the list, and Australia but two. These are the only self-governing Colonies which do contribute to the list, South Africa and New Zealand furnishing not a single case."—*The Law Journal*, Jan. 19.

AMERICAN BAR ASSOCIATION JOVRNAL

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WOODROW WILSON

February brings to the memory of the American people great men and great events.

The anniversary of the birth of Washington recalls the beginning of the great American experiment in representative democracy, which made of thirteen separate independent states one great Republic.

Lincoln's birthday recalls the preservation of the Union from the attacks of those within its own borders who sought its dismemberment.

The death of Wilson recalls the world-wide conflict between autocracy and democracy and the victorious part which under his leadership we played in that titanic struggle.

Wilson began life as a lawyer but he soon entered upon a greater career. His extraordinary intellectual equipment made him a teacher and particularly a teacher of jurisprudence, political science and the philosophic side of history. But he was not a teacher of things printed in books, nor of the bare facts of history. He taught the output of his own mental operations. He took the ores from all the mines of knowledge and in the crucible of his mind converted baser metal into the pure gold of truth.

There came a day when the fate of his country rested upon his shoulders. It was his to determine the hour when the United States should abandon its neutrality and participate in the most gigantic and terrible war of all time. A war in which the safety of our nation was inevitably involved and from which we could no longer be isolated.

The determination of the time to strike was the critical decision. Too soon, would be as fatal an error as too late, because modern war cannot be successfully waged without the utilization of all the resources of the nation, physical and spiritual. This demands a practically unanimous accord of all the people.

Once resolved upon entry into the war he prosecuted it with all the energies of his mind and soul. Although all the traditions of our government were for voluntary service and against conscription, he asked Congress to pass the Selective Service Act, signed it and mobilized the manhood of the nation for war.

There can be no doubt that when we threw into the scales of war our great financial resources and the flower of our young manhood, we changed an impending stalemate into victory, but it must not be forgotten that Wilson the teacher wrought with Wilson the President. His public utterances brought to the German people the first clear realization of the position into which they had been blindly led by false leaders and so impaired the morale of the civilian population that the power of resistance broke and the government fell.

After victory came the Armistice, the Versailles conference and the entry of Wilson upon the world stage.

Here Wilson the lawyer joined Wilson the teacher and Wilson the historian.

His advocacy of the doctrine that colonies should not be exploited for financial gain but that they should be administered for the benefit of their inhabitants, is an application of principles of the law of guardian and ward to international relations.

His appreciation of the great truth that there can be no peace without justice, and that there can be no justice without an appropriate judicial institution to take the place of war, was buttressed with law and foundationed on jurisprudence. This high legal concept guided him through the struggle with men of the old régime who viewed with skepticism his advocacy of lofty idealism and disinterested altruism.

Wilson's contribution to the cause of peace between nations cannot be justly measured in a single generation. He failed to realize all his aspirations but who shall say that he did not accomplish for the application of the rule of justice to international relations, all that the world state of mind with its war-begotten hatreds, fears and ambitions permitted? Who shall say that he may not accomplish more after his death than he was permitted to accomplish during his life?

IMPROVEMENT OF THE JUDICIAL MACHINE

II

COURT ORGANIZATION

The courts of the United States, both State and Federal, are overcrowded with work. Complaints arise everywhere of the law's delay.

In courts charged with the administration of criminal justice, these delays produce grave consequences. Opportunity is afforded to intimidate witnesses or to corrupt or placate them. Those who are incorruptible and courageous are often worn out by repeated attendance at continued sessions. Delay brings forgetfulness of important details and not infrequently Death summons a witness to appear before that court whose process takes precedence over all earthly subpoenas and recognizances.

More persons guilty of criminal offenses escape the just punishment of their offenses through the law's delay than from any other single cause. The result is that the deterrent effect of the fear of punishment is lessened and crime increases.

In the civil courts the effect of delay does not manifest itself in such dramatic form but it is no less real. Dishonest men refuse to meet their obligations because they know that the enforcement of these obligations is slow and uncertain. Men who have just claims forego to press them because they cannot spare the time and money necessary for resort to and attendance upon the courts. Conscientious lawyers advise their clients to exhaust every resource for a settlement out of court even though the settlement requires substantial concessions of right. The lawyer himself suffers serious loss of income because of his inability to furnish that prompt and efficient service for which his clients would be glad to pay if it were available.

The causes of these delays are numerous. Many of them are due to the inherent faults of human nature. We are here concerned with those which are due to the defects of the judicial machine.

In no department of human activity can a high degree of efficiency be attained without organization.

There are three prime essentials of organization: Discipline, Specialization and Cooperation. There must be an executive head, assignment of each member of the group to the particular task which he is best qualified to perform, and there must be team-work.

These are universal truths and have always been recognized as fundamental to the conservation of human energy. They are at the very bottom of military science. Modern quantity production would be impossible without them but our profession has been slow to perceive their application to the courts and to the administration of Justice.

In 1909, a distinguished special committee of the American Bar Association submitted the following statement of what was there termed the first principle of reformed procedure:

> The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. . . (Vol. XXXIV, Reports of Am. Bar Assn., p. 589.)

This principle had been recognized and put into effect in Great Britain and in European countries long before it received serious consideration here. It cannot be doubted that the superior efficiency of the British Courts is attributable in part to the organization of their judicial tribunals.

Great progress however has been made in the matter of the organization and unification of our courts. Congress has passed a thorough-going and satisfactory act which is operating very effectively. In Detroit and Cleveland notable work has been accomplished. For the Bibliography of this movement reference is made to the columns of the JOURNAL of the Judicature Society.

The trouble with reform of court procedure by legislative action is that it is too slow. While the enactment or repeal of laws is necessary for complete results, much can be done at once to secure a large measure of better organization and increased efficiency by the action of the judges themselves.

If in every state where court organization and unification have not been effectuated, the judges of the Supreme Court should call the judges of the trial courts for conference, a plan could easily be devised, following in the main the analogies of the federal act above referred to, which would accomplish great results. Nearly every State Bar Association has a judicial section under whose auspices these meetings could be held. In the larger states the meetings should be called first by judicial districts.

Such a movement will everywhere be worth while on its own account, and in addition it will be an aid to such more complete program of court unification as may be found desirable.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

THE American Law of Administration (Including Wills) by J. G. Woerner, Third Edition by W. F. Woerner. Boston: Little, Brown & Co. 3 vol. pp. cclxvii, 2121. $30.00. The new edition of this standard work on administration brings the footnotes down to date, many new cases being cited. The text (beyond certain exceptions to be noticed below) is almost wholly unchanged, though its usefulness has been increased by frequent cross-references from one part to another. As a result it seems strange that the subtitle *Including Wills* should have been added. Readers of a book admittedly confined to administration cannot expect a detailed discussion of wills. For the wider title, however, the comment seems rather perfunctory. Thus incorporation by reference is still "covered" by only one sentence. Changes in the text include a somewhat expanded section on the probate jurisdiction of Federal courts, and two new sections on inheritance, estate and income taxes. The last of these is extremely brief, for lack, it is said, of "controlling judicial interpretation of the act." The other two are more detailed and doubtless will put the searcher in contact with the cases in point, although for some reason not indicated certain cases, even of pronounced importance, have not been placed in the notes. The editor has not seen fit to include any citations to articles in law periodicals and reviews. In a work which justly claims to be more than a paste-pot-and-shears collection of cases, this omission is to be regretted. Aside from the foregoing points of criticism the new edition is well calculated to maintain the excellent name gained by the two preceding ones.

Shipman on Common Law Pleading, Third Edition by Henry W. Ballantine, Professor of Law, University of Minnesota. St. Paul: West Publishing Co., 1923. pp. xxii, 644. $4.50. It is nearly thirty years since the second edition of this book appeared, and enough cases have since been decided to make it a rather easy task to fill the notes with new authorities and present the whole as a substantially new product. Instead, Mr. Ballantine has left the cases much as they are (merely adding citations to more series of reports), and has done the harder and worthier task of recasting the entire book in the light of experience. The reader kept primarily, but not solely, in mind is the person largely unacquainted with the subject. Hence the book opens with a description of the way the machinery works in an action at law or suit in equity. Next comes an historical outline of the development of the various actions, followed by a discussion of each one in its proper place. This historical method justifies itself (if justification is needed) in the ease with which logical rules of procedure are fitted into the students' knowledge where otherwise there would be simply the forcible memorizing of an uncomprehended rule. This is followed by descriptions of the various stages of the pleading, and the conclusion consists of miscellaneous matter. Thus it is mainly in the more effective arrangement of the matter that the improvement has been carried out. An addition small in size but disproportionate in usefulness is a discussion of the Hilary Rules, which were wholly unnoticed in the previous edition. Also to be commended are the generous citations to articles in law periodicals, the large bibliography, and the inclusion, in an appendix, of the Rules of Civil Procedure drafted by the American Judicature Society.

The Irresistible Movement of Democracy, by John S. Penman, New York: Macmillan, pp. xii, 729. $5.00. The author undertakes to trace the political aspects of the democratic movements in the United States, France and England. No attempt is made to include the social, economic or general intellectual phases. Such a limitation is understandable. Harder to justify is his manner of opening the discussion for each country at a particular event, with little or no reference to the underlying causes of which it was merely the symptom. Thus the English movement "began" in 1763 with the election of Wilkes to Parliament. But why was he elected, why was there such popular interest and excitement back of it? Mr. Penman does not answer the question, he does not even ask it. Similarly in the French Revolution, events prior to 1788 are wholly neglected (except for one page given to Rousseau). Diderot and the Encyclopaedists are unmentioned. The tracing of events after we are once launched is more satisfactory, though not always wholly clear. Thus the reader will be sadly confused in trying to understand the policies of Mirabeau who, while approaching the zenith of his powers, is described as "always a strong advocate of the royal authority" yet on the next page is named as a leading member of the Jacobin Club, whose object even then was to "reduce the king to the first magistrate." This obscurity is the more serious because of the preeminence of Mirabeau as a leader at that time. The author has quoted voluminously from the speeches, pamphlets and writings of the time, a course which has obvious advantages, but also involves much space-using repetition, where his own opinions and comments would probably have been interesting and valuable. Footnotes could have contained the quoted matter. The fastidious reader will be slightly irritated by an overdose of split infinitives and grammatical errors, and the translations from the French often contain glaring inaccuracies both as to matters of substances and as to the spelling of proper names. And the reader with a sense of humor will be delighted by the discovery that Lloyd George appears in the index as "George, Lloyd."

The Sources of Law in Swiss Civil Code, by Ivy Williams. New York: Oxford University Press, American Branch. pp. 199. $2.50. Although the new Swiss Civil Code has been in effect since 1912 there has been very little comment on even the in-

novations which it introduces. This essay is aimed to call it to the attention of the legal profession in America and England. The author concerns himself only with those sections (of which section one is the most important) which define the sources from which the judge is to derive the rules enforced by him. In substance section one declares that where no code provision is applicable, custom shall govern, and if no custom has emerged, then the judge shall decide as he would "if he had himself to act as legislator," but guided herein "by approved legal doctrine and case-law." The interesting possibilities of such a general provision are obvious. The discussion deals with its historical background, with the manner in which similar problems have been dealt with elsewhere, and with the actual cases in which, during the period from 1912 to 1922, the sections came under consideration. Such conclusions and generalizations as these cases warrant form the final chapter.

Bavaria and the Reich, The Conflict Over the Law for the Protection of the Republic, by Johannes Mattern. Baltimore: Johns Hopkins. pp. 125. $1.25. The conflict discussed in this admirable pamphlet occurred during the summer of 1922, which in the present speed of events might be regarded as some time ago. In its broader implications, however, it deals with a question yet to be solved, viz. the position which particularist Bavaria is to occupy in the German Reich. The legal aspects, rather than the political, are taken up. An appendix contains translations of the laws and ordinances which, up to that time had been involved in the issue. Readers not familiar with German will meet with a slight amount of needless difficulty in the author's use of German terms even when the English equivalents could readily be given, such as Justizministerium for Ministry of Justice, and Sonderrechte for special privileges, etc.

Patents Throughout the World, by William Wallace White and Wallace White. New York: Trade Mark Law Publishing Company. pp. 244. $7.50. The attorney who may occasionally be forced to examine the patent law of foreign countries has a task doubly arduous because of the difficulty of gathering together the raw material of laws, administrative regulations, etc., and the frequent further handicap of coping with an unfamiliar or unknown language. This book has been planned to meet the needs of such a person. The requirements of apparently every country of great or slight commercial importance have been digested and set forth under uniform headings, which cover (among others) such diverse fields as the state of the law, treaties involved, who may patent, what is regarded as patentable, how long a patent may be contested, licenses, taxes, marking, assignment, etc., and lastly, what documents must be submitted. An introduction covers general items of information. It would be hard to suggest any point overlooked by the authors.

Recent additions to the list of Service Monographs of the United States Government being prepared by the Institute for Government Research are:

The General Land Office, by Milton Conover. $1.50.

The Railroad Labor Board, by Joshua Bernhardt. $1.00.

The Division of Conciliation, by Joshua Bernhardt. $1.00.

The Bureau of Internal Revenue, by Laurence F. Schmeckebier and Francis X. A. Eble. $1.50.

The Bureau of Public Roads, by W. Stull Holt. $1.00.

The U. S. Employment Bureau, by Darrell H. Smith. $1.00.

The Office of Chief of Engineers of the Army, Its Non-Military History, Activities and Organization, by W. Stull Holt. $1.00. All are published by the Johns Hopkins Press, Baltimore, 1923. The nature and purpose of the Institute were outlined in the May, 1923, number of this JOURNAL. The monographs are excellently adapted to advance the purposes outlined in their foreword, "to furnish an essential tool for efficient legislation, administration and popular control, and to lay the basis for critical and constructive work on the part of those upon whom responsibility for such work primarily rests."

If Hamilton Were Here Today, by A. H. Vandenberg. New York: Putnam, pp. xxxv. 366. $2.50. Mr. Vandenberg is one of those doubtful believers in the stability of our national Constitution who are constantly asserting that it is tottering and must be saved. The first to perform this task of saving the Constitution, he says, was "the greatest American, Alexander Hamilton." Even the immediately subsequent triumph of Thomas Jefferson, Hamilton's arch-opponent in every policy and respect, did not undo the good work, although by force of the author's logic Mr. Jefferson's Americanism must have been of a doubtful quality. But Hamilton, according to Mr. Vandenberg, has done more for us. He has left us, in his writings and utterances, a body of precepts capable of continuing the process of saving the Constitution and suited to solve every problem now confronting us, from the Ku Klux Klan and labor difficulties to prohibition and, doubtless, the regulation of radio messages. That is to say, his principles can be interpreted and applied in much the same way in which the Constitution itself can be interpreted and applied. The writer sets himself up as the John Marshall or the Taney of Hamilton's writings. If indeed Hamilton is the "greatest American," this task requires a mind second only to Hamilton's. To attempt alone and unaided something similar to what the Supreme Court has labored on for a century is ground on which even the ordinary wise man might fear to tread. To rush in without a tremor of fear shows how far our writer is removed from the mere ordinary wise man. As to style the book is the exact counterpart of an expanded Fourth of July oration. In view of so much merit the reviewer may be permitted one criticism. The dedication is to a certain private business institute through which "the most illustrious name in American history" is brought to the attention of our citizens. Are American idealism, American admiration for greatness and American reverence for the past so weak, and American materialism and dollar-hunting so strong that a business concern is needed to advertise the fame of a great citizen? If this were so, there would be little use in saving the Constitution because the nation itself would hardly be worth saving.

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The Constitution as It Is—Payne's Version, by William O. Payne. Metropolitan Supply Co., Cedar Rapids, Iowa.—To the general movement to bring the Constitution home to the minds and hearts of the people, Mr. W. O. Payne of Des Moines, Iowa, has made a distinct contribution. In a booklet entitled "The Constitution As It Is" he has presented that great instrument in certainly the most intelligible form for the average reader in which it has

yet appeared. His plan has been, first, to remove all "dead" matter in it to foot-notes; second, to place the amendments in their logical and proper place in the text; third, to transfer certain parts of the text to a more appropriate place under the heads which represent the very clear and logical classification he has adopted. Thus one who wishes to know exactly what the Constitution says today has it in a readable and easily assimilable form. Those whose curiosity extends to its historical development and change have in the foot-notes all the information which the Constitution contains on the subject. The idea is novel but eminently practical, and it has been well executed.

II. Current Law Journals

EDWARD P. BURFORD of Lawrenceville, Va., in an address before the Virginia Bar Association, which appears in American Law Review for December, points out the dangers of *"Federal Encroachments upon State Sovereignty,"* and calls upon the legal profession to "exert their splendid talents in the dissemination of knowledge of the dangers with which our institutions are threatened."

Under the title *"Business Security and Legal Security,"* in Harvard Law Review for December, Prof. Nathan Isaacs calls attention to the "gap between the law's forms and their use in business," cites numerous instances in every day business "of the use of legal devices for purposes which they fit so loosely that the legal security for enforcement which they provide becomes upon examination a mere outer covering for what actually takes place," and sounds warning that "In the presence of the business practice of using the limited supply of legal forms for unlimited varieties of needs, the lawyer must face a sharp alternative: either he must confess his inability to answer many questions that the business man habitually refers to him, or he must broaden his studies as the newer schools of jurisprudence demand, so as to include the actual workings of legal institutions and doctrines." In the same journal Frederic G. Dorety defends the use of reproduction cost in rate making valuation, in an interesting article entitled *"The Function of Reproduction Cost in Public Utility Valuation and Rate Making."* Opposite views are taken on this point by Donald R. Richberg, of Chicago, in an article in Harvard Law Review for January, under the title *"The Supreme Court Discusses Value."* Mr. Richberg thinks that "the reproduction cost theory has been and must continue to be based on opportunism and not on principle." An article on kindred topics is to be found in *"Valuation of Leasehold Railroad Property"* by Fred Esch, of Washington, which appears in Yale Law Journal for January.

Prof. Herbert Goodrich, University of Michigan, analyzes and discusses the many vexing questions raised in connection with *"Divorce Problems in the Conflict of Laws"* in Texas Law Review for December.

Michigan Law Review for December contains an interesting discussion by Claude A. Thompson of the New York Bar of the question, "Does the approval of a conference agreement by the Shipping Board under section 15 of the Shipping Act of 1916 legalize an agreement, which, but for such approval, would be in violation of the Sherman Anti-Trust Law?" Mr. Thompson argues that it does. The article is entitled *"Shipping Act of 1916."*

Prof. I. Maurice Wormser's article, *"The Development of the Law,"* in Columbia Law Review for December, is peculiarly refreshing in these days when criticism of the law seems the fashion. "My thesis," he tells us, "is that the criticism of legal science is unjust; that it has demonstrated and is daily demonstrating its ability to extricate itself from difficulties, and to set forth with precision and with truthfulness, the principles which govern our intricate network of present-day interests." Mr. Wormser cites many instances from the various fields of law to support his conclusion that "the law and its administration alike have within them the germs of a healthy growth and of a hopeful promise." He finds, however, "cause for alarm in the present attempts at 'a restatement of the law,'" which he considers "plainly a recrudescence of the movement" for codification of the common law, and which he believes to be entirely unnecessary. "What we need is not a 'restatement of the law,' but a scientific development of our present precedents. What we need is not a 'restatement of the law,' but an educated, well trained bar, and an independent, experienced and permanent judiciary, which will study the law 'from without,' as well as 'from within,' and which will consider, in connection with the molding of precedent, the teachings of the other great sciences, all of which, correlative and correlated, must be harmonized with one another." The article deserves wide reading.

Prof. Albert Kocourek, Northwestern University, advocates, as a measure of relief for the appellate courts, the appointment by each judge of one or more referendaries, to assist him in his judicial work, from the best scholarship of graduating classes of the law schools maintaining the highest standards. The article is entitled *"Relief for Appellate Courts: the Referendary System,"* and appears in the Journal of the American Judicature Society for December.

"The Search and Seizure Provisions of the Federal and State Constitutions" are interestingly discussed by John D. Carroll, Frankfort, Ky., in Virginia Law Review for December. In the same journal Henry H. Glassie contributes an article on *"Restoration of the Former Front Estate by Alluvion."*

Under the title *"State Production and The Commerce Clause,"* Prof. Thomas Reed Powell discusses the recent decisions of the Supreme Court sustaining the Pennsylvania tax upon anthracite coal and the Minnesota occupation tax on mining or producing ores within the State. The article appears in California Law Review for December. The same journal carries an article by Herbert Rabinowitz on *"The Kansas Industrial Court Act."*

Grant E. Trent, of Washington, contributes a very interesting article in Virginia Law Review for January, upon *"Philippine Public Law and its Constitutional Relation to the United States."* In the same journal Thomas W. Shelton, of Norfolk, points out that "the student of today is fortunate in living in the beginning of what is actually a new era in government; when the lawyers, instead of subserviently seeking a few repairs to the machinery of the courts from the Legislative Department, have declared their organic independence of it and are demanding the Constitutional right to erect a new and scientific machine for administering justice, for the proper order and operation of

which they will give assurance to the people." He finds support by the people growing. The article is entitled *"The Struggle for Judicial Independence."*

Michigan Law Review for January contains an instructive and helpful article upon *"Statutory Regulation of Railway Equipment Agreements,"* by Kenneth Duncan.

Prof. William R. Vance, Yale Law School, presents a clear conception of the extent to which tenure still exists and is important in the United States in Yale Law Journal for January, under the title *"The Quest for Tenure in the United States."*

In the same journal Roswell F. Magill, of Chicago, considers *"The Income Tax Liability of Annuities and Similar Periodical Payments."*

"Judicial Self-Limitation" is the subject of an interesting article by Maurice Finkelstein in Harvard Law Review for January. Mr. Finkelstein undertakes to prove "that when a tribunal approaches a question, where on one horn of the dilemma is the trained moral sentiment of the judge, and on the other the 'hypersensitive nerve of public opinion,' it will 'shy off' and throw the burden of the decision on other shoulders," which he thinks is "on the whole a wholesome instinct."

Articles of interest upon specific topics appearing in the current journals include: *"Party Wall Agreements as Real Covenants,"* by Charles E. Clark in Harvard Law Review for January; *"Mixed Questions of Law & Fact,"* by Francis H. Bolen, in University of Pennsylvania Law Review for January; *"Presumptions,"* by Victor H. Lane, in Michigan Law Review for January; *"Criminal Responsibility of the Corporation,"* by Joseph F. Francis, in Illinois Law Review for January.

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CURRENT LEGISLATION

OLD AGE PENSION LEGISLATION

By J. P. CHAMBERLAIN AND STERLING PIERSON

AT the sessions of the state legislatures in 1923, the question of old age pensions was very seriously considered. There resulted from the debate three acts. Nevada Chapter 70, Montana Chapter 72 and Pennsylvania Chapter 141, and commissions of investigation were appointed in Massachusetts and Indiana. In Illinois the bill was passed by the lower House but failed in the Senate by a narrow vote[1]. In Ohio, a bill was initiated outside the legislature but was not adopted by the people.

While showing sufficient similarity to give evidence of a common model, the three acts differ greatly in important points. Each statute contains a different solution of the problem of administration. No state administration is set up in Montana, where enforcement is a purely local matter. The pensions are fixed and distributed by the Old Age Pension Commissions of the counties, which are the Boards of County Commissioners. The members act without compensation on old age commissions. The Nevada law, representing the tendency toward centralization, provides for the appointment of a Pension Commission, consisting of the governor, lieutenant-governor, and the attorney-general, to act without compensation. The lieutenant-governor is to act as superintendent of pensions and receives a salary for his service. In each county a board is set up to be composed of three persons domiciled in the county but central control is kept as the members are appointed by the governor. In Pennsylvania the system resembles that of Nevada, but the state commission is appointed by the governor instead of being *ex officio;* the members are paid $10 a day while actually engaged in the work of the commission. The county boards furthermore, are appointed by the governing body of the country, the county commission, not the governor. In both Nevada and Pennsylvania the expenses of the county boards are borne by the counties.

The administrative differences correspond to the diversity in the way of raising the funds for the pensions. In Montana this is, like the administration, wholly a county matter. The counties are to supply the money from the county poor fund. In the other two states, the cost of the pension system is raised on a state-wide basis but in each in a different way. In Pennsylvania, an appropriation is made from the general fund of the state, in Nevada, the boards of county supervisors are directed to levy a special annual assessment of two and one-half mills on each one hundred dollars of taxable property in their counties, and to forward the proceeds to the state treasury to go into a special fund from which pensions are to be paid.

The source from which the pensions are to be paid naturally controls the method of fixing pensions in any particular instance. In Montana the local board decides, but in both Nevada and Pennsylvania, the state board, acting on recommendation of the local boards, finally determines whether a particular individual is to receive a pension. Thus the preliminary investigation is in every case local, but the state and not the country board passes finally on the payment from the state funds.

The amount of the pension "shall be fixed with due regard to the conditions in each case," but is not to be fixed at an amount which when added to the pensioner's income from any other sources will exceed one dollar per day in Nevada and Pennsylvania. In order to limit further the granting of pensions these acts provide that no pensions shall be granted to a person if the value of his property exceeds $3,000 or, if married, if the value of the property of the two spouses exceeds $3,000. The Montana act has no property qualifications, but does provide that an applicant must not have an income in excess of $300 per annum. There are further provisions for the protection of the state's financial interests. It is provided, for example, that the commissions may require the assignment or transfer of the applicant's property as a condition precedent to relief, and at the pensioner's death the state is allowed to collect from the property of the decedent the total amount granted to him during his life with interest at five per cent in Montana, and three per cent in the other states. Severe penalties are recoverable

1. American Labor Legislation Review V. 13 p. 171.

against the decedent's estate, whenever it appears that he had property in excess of the amount allowed by law, while in receipt of a pension.

But an applicant must have qualifications other than property. In Nevada he must have reached sixty years of age, and in Pennsylvania and Montana seventy years of age. He must have been a citizen of the United States for fifteen years, and a resident of the state for at least fifteen years in Pennsylvania and Montana, and ten in Nevada. Montana provides that no relief shall be granted to an applicant if he has, within ten years of making application, been imprisoned for any offense punishable by imprisonment in the State Penitentiary, while Nevada denies a pension to any person who, during the ten years preceding application, has been imprisoned for four months or more for any offense for which he was sentenced to prison without option of a fine. Pennsylvania requires that he must not at date of application be an inmate of a prison, jail, workhouse, insane asylum, or any other public reform, or correctional institution.

Other standard provisions are that the applicant must not be a wife or child-deserter, that he must not have been a professional beggar or tramp within one year of application, that he must not have deprived himself of property in order to obtain a pension and that he has no one else responsible for his support and able to support him; and after he has filed his bill of particulars as to his needs and character the applicant is still at the mercy of the local authorities, who investigate him thoroughly and make a recommendation as to whether he shall receive a pension and how much it shall be. Equality of sex is made the rule as no woman who has deserted her husband can have a pension.

When the certificate is finally granted it is only good for one year and must be renewed annually. This is to assist the commissions in maintaining a check upon pensioners' incomes and property. In Montana the pensions are payable monthly, but in Nevada and Pennsylvania the commission may, in its discretion, pay them monthly or quarterly. All of the acts provide that the grant of the pension does not confer upon the pensioner any vested rights, and that he holds subject to amending and repealing laws.

Except for one act of somewhat limited scope, and another confusing old age pensions and poor relief which was held invalid, these are the first states to accept a principle largely embodied in the law of other countries. Great Britain adopted her old age pension act in 1908[2], after much agitation and investigation. She acted long after New Zealand which had provided for relief of old persons in 1898[3]. Australia followed in 1908.[4] The New Zealand act gave pensions to males of sixty-five and females of sixty, provided that they had resided in the country for the past twenty-five years, and complied with other qualifications as to property, income and personal conduct. The Australian act made no distinction of age between men and women, for both it was fixed at sixty-five, but it introduced a new idea, by pensioning persons of sixty who were incapacitated for work. The British law raised the pension age to seventy and it and the Australian law laid down stringent residence requirements. All of these acts provided for central control, with local officers whose decisions are reviewable. Though Denmark, by an act passed in 1891, adopted the non-contributory old age pension plan,[5] a different system has taken root in the continent of Europe. Germany led the way with an act establishing a system of old age insurance, by compulsory joint contributions of employers, employees and the state. This system makes it possible to vary the old age annuity for larger or smaller wage earning classes, so that a man earning a larger income during his working life, will have a large annuity. It is also necessarily limited to employed persons.[6] Its complication, and the fact that women would not be taken care of under such a system, led Parliament to prefer the straight pension plan. France, however, adopted in 1910,[7] the compulsory insurance plan, after unsatisfactory results from a voluntary scheme.[8]

The year after the British and Australian acts went into effect the pension idea made its first appearance in the United States. A special commission was appointed in Massachusetts in 1910 to investigate the subject of old age pensions, and after two years reported adversely to such a system for that state.[9] The same year, the New Jersey legislature passed a joint resolution reciting that "The so-called civilized industrialism of our day can be subject to no stronger criticism than the charge fortified by universal experience that the men and women whose productive energy have contributed so much to our wealth, progress and development, leading simple, inexpensive lives, become in their declining years powerless, principally because they are penniless," and authorizing the Governor to appoint a commission to investigate the conditions of aged persons within the state and make recommendations as to future legislative action.[10]

In 1914 the movement progressed beyond the "investigating" stage, and an initiative measure was adopted in Arizona providing for the abolition of all the almshouses in the state, which were to be sold and the proceeds devoted to old age and mothers' pensions.[11] Section 3 of the act provided that the state should pay to each man and woman sixty years of age or more, $15 per month, during their continued residence in the state, provided that the recipients must be citizens of the United States and residents of the state for five years preceding application, and must have no visible means of support. Section 5 provided for the appropriation out of the general fund of the state treasury of a sufficient amount each year to carry out the provisions of the act. It was inevitable that the court should hold this act unconstitutional because of its indefiniteness, its failure to provide a proper system of administration, and the fact that mothers' pensions were granted to persons who were not indigent and unable to provide for their own support. The case in which its constitutionality was attacked was directed at the mothers' pension provision; but the court held the entire act invalid, saying that "While the object of the act is easily determined from its title and context, the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat. Standing alone, it is not a complete act, and unless the existing laws supply its defects or omissions, it is difficult to see how it may be carried into effect."[12] The court also stressed the practical difficulties and hardships which would result to indigent people who were not within the class designated by the statute to receive pensions if all the almshouses were abolished.

2. 8 Edward VII, C. 40.
3. 1898 Acts of New Zealand No. 14.
4. Commonwealth Acts, 1908, No. 17.
5. Report of U. S. Commissioner of Labour 1909, vol. I, pp 623-649.
6. id. p. 1354-1444.
7. Loi de 5 Avril 1910.
8. "Old Age Pensions" A. Epstein, summarizes all of the European laws.
9. See Report of Ohio Old Age Insurance Commission at P. 271.
11. See Arizona Acts 1915, initiaitve measures P. 10.
10. See Jt. Res. 1910, No. 1.
12. Board of Control vs. Buckstegge 18 Ariz. 277.

"A more numerous class would be deserted and forsaken under the terms of this act, if effective, than would be cared for." But it nowhere indicated that old age pensions were *per se* unconstitutional. Indeed, the two opinions seem to indicate that they would have upheld a statute which went into the necessary details of definitions and administration. This trend is particularly noticeable in the concurring justice's opinion.

The following year a law was passed in Alaska providing that any pioneer[13] who had attained the age of sixty-five and had resided in Alaska for ten consecutive years and was entitled to the benefits of certain designated Pioneers' Homes, might make application for an allowance to be paid by the trustees of the homes out of the funds of the homes. The allowance was not to exceed $12.50 per month, and after being granted was not to be diminished in amount, although it might be increased. The allowance was to be paid quarterly by warrants drawn upon the Home's funds in the hands of the Territorial Treasurer, and any unpaid instalments were to become obligations of the Territory. But in order to escape Congressional dissatisfaction the act provided that no federal funds were to be used for these allowances in the absence of authorization by Congress. Subsequently the benefits of this act were extended to pioneer women, who were given allowances of not exceeding $25 per month upon reaching sixty years of age, and still later it was required as a condition to granting such relief that the recipient give an affidavit vesting title to all of his property in the Territory of Alaska upon the recipient's death, to the exclusion of all heirs except a surviving spouse living in the Territory. "Pioneer" was defined to exclude Indians.

Further investigations were made by special committees in Massachusetts 1917[14], Ohio 1919[15] and Pennsylvania 1919.[16] Senator McNary of Oregon introduced a bill for old age pensions in the United States Senate in 1919 but it died in committee.[17]

There is little doubt that the constitutionality of old age pension legislature will soon be presented to the courts. If it is upheld, the experiment now being made in Pennsylvania, Nevada and Montana will be worth careful watching.

13. Alaska, Laws 1915 C 64.
14. See Report of Ohio Old Age Insurance Comm. P. 272.
15. Ohio Laws 1917, p. 420.
16. Pa. 1917 Jt. Res. 413.
17. 66th Congress 1st Session 1-S, 2803.

THE PRESENT DAY JURY: A DEFENSE

Much of Criticism of Juries as of Other Institutions Is Based on Fallacious Comparison of Their Operation With Some Ideal Existing Only in the Mind of the Philosopher—Judges as Substitutes for Jurors—Present System the Most Practical

By CONNOR HALL
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TO defend the jury so far as its own existence is concerned is a superfluous task. It does not trace its origin to any Constitution of Clarendon, Magna Charta or any other definite act of a given time, but is the slow development of a long period; is thoroughly imbedded in English and American institutions and its abolition is no more likely than the abolition of *habeas corpus*. Nevertheless, it is not out of place to take some notice of the criticisms which have been made upon the jury particularly as a civil institution from time to time by a number of persons, including even students of history and Constitutional Law. It can never be out of place to help instruct a people in the value of their institutions. It might seem strange that the jury which has developed naturally and has existed only because it was adapted to the needs and wishes of the people and for which it has been necessary to wage the fiercest battles with arbitrary governments should be assailed even with apparent bitterness.

Some of the evils pointed out are merely superficial and in no way essential as, for instance, that juries are filled with professional jurors. This is easily remedied as by statutes limiting the jury service of any one person as in West Virginia to once in two years, and in the Federal courts to once in one year.

Laying aside such non-essential incidents that arise from time to time we find the criticisms of the jury in its essential existence have been directed rather to its civil than its political nature. The suggestions that the jury should be abolished are usually confined to civil cases, though we do find occasionally some zealous persons who propose that certain classes of accused be tried by a commissioner or justice of the peace or other short hand tribunal which will readily dispose of the cases. The political nature of the jury is most markedly manifested in criminal trials, but is by no means confined to these. Its political value in civil as well as in criminal cases is profound.

But taking up the jury as a civil institution we find that the usual criticisms are the lack of agreement, while unanimous consent is required; that the jurors are not only untrained in many specific problems coming before them but are, generally speaking, uneducated, and finally and most important, that they are influenced largely and in some cases almost wholly by prejudice.

Whether unanimity should be required in the verdict of a jury is a question fairly open to debate. A numbr of states have in civil matters allowed a lesser number to decide, and so far as we know, no evils have resulted. This, likewise, does not go to the essential constitution of the jury.

The essential criticisms, however they may be stated, finally resolve themselves down to those that the ordinary jury is uneducated and prejudiced. In the first place it is not sufficient to prove that all this is, or might be, so. The question arises, what is to be substituted and where are we to find men of any kind perfectly trained for the specific problems, entirely well educated and unprejudiced? Much of the criticism of the jury as of other institutions, is based upon a fallacious comparison. The commentator sees certain evils in existing institutions and compares the

result of these with that ideal result existing only in the mind of the philosopher. It is this strength of an opposition which lends a show of plausibility to criticisms which are often in fact wholly worthless.

We come then to the question, if the jury be abolished in civil trials, what is to take its place? Manifestly a judge, or two or more judges, or mayhaps a Soviet commission, who are to pass not only upon the law, but upon the facts as well. Then the inquiry arises, may we more reasonably expect a just result to be obtained by a bench of one or more judges than from a jury? The superiority of the jury is so clear and decisive that it is no wonder it has survived. Training and education are relative terms. No man, be he judge, juror, traveler or scholar, is trained to all specific problems that daily arise in human controversies. He may have the widest technical knowledge, the greatest personal acquaintance and knowledge of men and affairs, the longest experience of life, and yet, the first day he enters a jury box he may have presented to him for decision some problem with which he is wholly unfamiliar. If this be the case with the most accomplished juror, how much more with the average, the moderately well trained and educated man? He will find his own knowledge and experience entirely insufficient, and will be driven to the practice already long established, of calling in as witnesses those who are particularly qualified in the problems. All that is required of him is that he shall have fair intelligence and an open mind to hear and consider what is laid before him; and of these two qualifications, the latter is, if possible, of more importance.

Loud complaint is heard that the city business man dodges jury service. Whether the jury would be improved by a larger representation of leading business men is doubtful I have often found myself, and have seen others, striking off the jury list the town business man and choosing instead the farmer or mechanic, and for no other reason that I could gather than that the latter were regarded as better qualified for the service, because their minds were more open, while the town business man, impressed with his own knowledge and perhaps his own importance, was more likely to insist upon his own particular views. It is not unusual to find the business man who has read "Every Man His Own Lawyer"; has consulted lawyers a great deal or knows the judge familiarly. From one or all these he may imagine he knows some law and have developed a great conceit of his own skill in the solution of controversies. When he does this he automatically passes into the class of ex-justices of the peace, ex-constables and other undesirable smatterers.

When we speak of prejudice we usually mean the other man's views. Prejudice is a bad name which we give to the dog before hanging him. Prejudice of course, merely means pre-judged, more or less fixed ideas, which in our friends is spoken of as conservatism. A big banker is conservative. A "hick" without a collar is prejudiced; though the truth is that each has had a narrow experience, their knowledge and experience lie in different fields, and one is about as good as the other if transferred.

When we consider the differing modes in which jurors and judges are selected certain advantages of the former as triers of fact are immedately obvious. A judge is elected or appointed for a definite time, longer or shorter, for life or for years. He sits constantly trying case after case and is known as a man having power, before whom a given case will be brought. Jurors, on the other hand, are drawn from the body of the people for a single term of court; for a particular case a panel of only part of the whole number is drawn, and from these all partial or interested persons are excluded, and even afterward the parties have the right without question to strike off a certain additional number. They thus come to the case new, disinterested and unbiased. This difference in constitution gives a number of advantages:

First: The judge, if chosen for a term, is liable to political influence, from which the juror is wholly free; and if for life, he is more apt than a juror to become an oppressive instrument of government.

Second: The jury decides promptly. The judge may take the case under advisement and withhold decision for months or years.

Third: All courts and permanent tribunes tend to accept crystallized formulae and artificial concepts, so that the decision becomes more and more technical, while a decision from a body of laymen drawn each time from the people brings the decision back to an original sense of justice.

Fourth: The prejudices of one or more judges are worse than the prejudices of twelve men whose differing opinions are modified by those of their fellows.

It is not sufficient to prove that jurors are not perfect men or fitted to take part in the council of the gods on Mount Olympus. It is sufficient for the purpose of the case to show that they are better fitted to decide those particular questions than the judges we choose. And these latter, be it remembered, are not the ideal conceptions of the mere opposition. They are not the just men in the dreams of the philosopher. He is a very human fellow, who may, and often in fact does, have a weather eye out for the opinion of the banker who holds his note, of the social leader to whose house he desires his wife or daughter to be invited, and above all, of the voter, ever present in the gallery, and the low-brow political boss ever present to the mind's eye sitting on the side or sending his messages how such and such a litigant is a good friend of his, a good worker in the party, etc., etc. These are not mere imaginations. They are all too present an evil, and every lawyer, and every well informed man knows they are facts. Of course, a great deal of litigation is not subject to such influence, but a great deal is, and in any event, when it comes to deciding questions of fact I would rather have an honest farmer, who holds no office and expects none, who knows none of the parties and cares nothing about any of them, who is simple, modest, unambitious and open-minded, than the average judge who may be, and often is, an honest, upright man, uninfluenced by personal or other considerations, but who may be and often is the reverse. The suspicion to which judges are subjected is often unjust, but be this said of the other man: he has been so chosen as to eliminate even suspicion.

Judges appointed for life or during good behavior are not ordinarily liable to political influence, that is, the political influence which arises from a desire for re-election. They are, however, subject to an influence which has often proved baneful, the desire to serve the government under which they hold office. The judge is, and soon comes to feel very keenly that he is, a part of the government engaged in enforcing

its laws and establishing its peace. It is not wonderful then if he is found on the side of the government and against the individual. There is another influence to which he is subject, the influence of party. Before his selection he was usually a party man, taking active part in political contests. He becomes imbued with the ideals and ambitions of the party. If at a time of crisis, as in a great war, or other period of excitement, the government finds it desirable to pursue a certain policy and that government happens to be in control of the party to which the judge belongs, he, however honest he might possibly be, is a dangerous tribunal to which an individual whom the government might be pursuing should submit his entire fate. It is particularly under such situations in criminal trials that the jury has proved the last refuge of freedom.

The constitution of the jury requires that the issues should be submitted to them and decided promptly, whereas a judge may take the papers and keep them for months or even for years. Lord Eldon was one of the greatest jurists of history and his decisions were seldom wrong, but during his incumbency as Lord Chancellor England suffered under an oppressive burden such as even the most debauched jury system could not impose. We are told that when an argument had been ended he would indicate his opinion, which was usually right, but he would take the papers and consider further, then perhaps have another argument and further consideration, until finally, the whole matter had passed out of his mind and at the end of ten, fifteen or twenty years' delay, both parties were ruined. To be sure we need not anticipate any such dangerous delays as this. Nevertheless, it shows what a system of fact-finding and whole-case-decision by judges may come to. I believe it is the experience of every lawyer that there is much more delay in chancery than in law cases.

Perhaps the most serious of all objections to the judge as a finder of facts lies in this: that every sect, every profession, every particular calling tends to become crystallized into a narrow esoteric body. What were once fresh and original principles with the capacity for life and expansion, became hardened formulae. Thus, the teachings of the early Hebrew sages became formalized into ceremonies and order of the Pharisees. Lawyers, and courts even in a greater degree, are subject to the same evil. Their principles, too, tend to become crystallized; to assume the shape of formulae and artificial concepts. In short, they become technical. For this reason we find that almost every generation for years has witnessed the passage of acts of legislatures, declaring that in the decision of cases the courts shall not be bound by form or method, but shall give judgment according to the very right of the cause. The act is passed. The legislature of the next generation passes a similar act, and so on generation after generation, all declaring in almost identical language that form shall be disregarded and judgment given according to the very right of the cause. Apparently all were equally futile, and each generation as if ignorant of what has been enacted before, with equal hope, passes a similar act. One of the oldest is 12, Edw I, and one of the latest the Act of Congress of February 26, 1919. There is hardly a state in the Union which is so poor as not to have one or more of these statutes, and sometimes several expressed in different terms.

All this is eloquent testimony to the crystallizing, hardening, formalizing tendency of courts, and the repeated enactment of these statutes shows that in the judgment of the community this tendency has not been arrested by the repeated attempts of the legislature. And it is not strange; for in fact, acts of the legislature cannot arrest such growth. It lies in the very constitution of human nature, that the more it studies a particular subject, the more it becomes interested in it, the more does it exclude other subjects and become narrow. Its conclusion of yesterday becomes a sacred formula of today. Everything comes to be tested, not according to broad general principles, but according to the narrow concepts of the particular profession or art. The jury is the reverse. It is, as Hallam has so beautifully stated, like a pure fountain of justice constantly springing forth. By this, of course, the historian does not mean that juries are particularly pure-minded or generally superior to other men. What he means is that the jury is drawn from the body of the people, from the laymen, from the simple and the natural; not from any particular art or profession, but from all. They thus bring to the aid of the court those untechnical, fresh and original conceptions of justice and right which act as a constant corrective to the formalizing tendency of the court.

This brings us to the main objection to juries, that they are prejudiced. In the speculations of the philosopher the actual juror suffers in comparison with that hypothetical, perfectly intelligent, perfectly philosophical creature evolved from the consciousness of the dreamer. But he does not fare half so badly when compared with the money-borrowing, socially climbing, office hunting individual on the bench. Does not the latter, too, have his prejudices, quite as fixed and detrimental as those of the juror? Caste is one of the hardest, most persistent facts of human nature. Some man who has found a biggest whale tooth on the shore, whose father fought in a famous battle, who owns more bank stock, or whose ancestor was touched on the head by a holy medicine man, assumes for himself, and others allow to him, certain superiority, and the belief of such superiority becomes imbedded in the community and is a constant fountain of wrong. In Egypt, in India, in England, and in America, among the cave dwellers, and in the year 1923, the influence of caste and class is pervading. This prejudice, most felt by the upper members of society from whom the judge might come or to which he has come to belong and by which he might be moved, is an influence much more pernicious to the cause of justice than some rural notion that the changes of the moon influence the growth of beans, or, even that the earth is flat.

The truth is that when we talk of a certain class of men as prejudiced too often we are merely displaying our own smug egoism. All men are prejudiced. Each man's mind is but a narrow slit into the great world of existence. The farmer's mind comprises but a small part of that great world. So does the mind of the pretentious statesman, or the learned lawyer, with his quillets and his double recoveries. Of course, we may distinguish between the prejudices found among the jurors and the prejudices found among the upper class of city dwellers. The former undoubtedly do not have as much knowledge and have not enjoyed as much experience as the latter. Their notions are mostly more old-fashioned. Their minds are simpler. Their emotions are simpler. They are, in short, more primitive creatures. But, is not this in fact so far from being a disadvantage an advantage in the jury system? Government after all, is a

hard business. There are many people in the world and most of them are ordinary. The highly cultivated man who bathes every day, who wears clothes which do not offend the eyes, has a modulated voice, and speaks of books that other cultivated persons have read, and enthuses over other natural objects that others have visited in other various parts of the world, is a rare creature. The world is made up mostly of common people, who seldom bathe, large numbers of whom have never seen a bath-tub but wash their face and hands out of a pan on the back porch; of sweaty, grimy mechanics; of browned truckmen; whose figures, manners and speech are uncouth and unpleasing. But they constitute that great working, eating, feeling mass which it is the business of government to keep going in as orderly way as possible, and above all, to keep fairly well satisfied. They are not the flower of civilization, but they are the roots and stem. They may not understand Ibsen or the tendencies of contemporary drama; they may be entirely ignorant of Shavian art. But they have those settled, commonly accepted notions of life and experience which have been tried long enough in the hard school of the world's experience to have passed the test. Government and its most important function, the administration of justice, must be suited to this vast throng along with the more cultivated. It might, in fact, be said that the reason for the long survival of the jury is its prejudice; that is, those settled, ordinary, common prejudices which stand unshaken. If juries had not reflected the common opinions and feelings of men the institution would not have survived so long and so successfully.

There are differing concepts of justice, and in most cases there is a better chance of justice from a jury of ordinary men than from any substitute. The ordinary "hill billy" is usually a man of open mind, considerable intelligence and emotion. A cultivated professional man tends to become more selfish and is usually more cold hearted, or at least case-hardened. It is by no means assured that a better justice would be administered by the latter type than by the former. A man who has no axe to grind, but is an honest, natural, emotional creature is about the most practicable, and it is submitted, the most just tribunal to which controversies can ordinarily be referred. There is at hand an apt illustration of this truth. All can remember the time when juries were regularly inveighed against by many lawyers and laymen for prejudices in personal injury cases. If a brakeman working upon a railroad or a workman in a mill was injured, the jury was sure to find a verdict for the plaintiff, no matter how overwhelming the evidence of his contributory negligence might be. This litigation has largely ceased by reason of the Workmen's Compensation Acts which have adopted the view of the jury; that is, that the industry and not the workman should bear the workman's injury. And the law has thus, within a few years readjusted itself so as to square with the juror's conception of justice, and we believe, with the common consent and approval of all thinking men. It is an apt illustration that justice does not always lie in the unbending application of the legal formula in which weak and erring men have endeavored to express it. A little more flexibility in its application through utilizing the assistance of a distinctly untechnical tribunal proves advantageous.

What does all this mean? that judges are corrupt, untrustworthy and oppressive? That they are unfit for their places, and that the courts are tainted? Not at all. What we have said amounts to no more than this, that judges, too, are human. Englishmen and particularly Americans owe the preservation of their liberties a large part to the manly stand of fearless judges. This debt should not be forgotten. In the United States today while judges are not all that we would wish, nevertheless, we find honest, hard working men daily laboring to administer justice upon inadequate salaries and with an uncertain future facing them at the end of their terms. This deserves its reward. All this, however, does not alter the fact that they labor under serious disqualifications as triers of fact. In a decision of the law the judge is guided by precedent, by which he can in his turn be judged; his decision is subject to a full review by another tribunal where the facts are set out in public reports. Upon facts, however, only a limited review is practiced, or is in fact practicable. A prior case is not a guide to a later case. Each case in its facts is individual. An appellate court does not and cannot undertake to go into the full details of all the evidence. Furthermore, there is a necessity that law should be passed upon only by a skilled class. Perhaps if we could always pick out twelve impartial, average men from the community and submit the entire controversy, fact and law, to them, a better measure of justice might be obtained. But this is impossible. In the first place there must be law and a machinery in order to select a jury. Otherwise, we should find the jury selected from among the bowmen of some chief, or the flatterers of a king, or local grandee. Second, all human action would be uncertain. Third, there would be no guide for an individual to follow. It is at this point custom arises and is then hardened into law, becoming at once a light to the individual and a bridle upon the government. In the expounding of these principles judges and lawyers are necessary. But it by no means follows that because they are necessary in this particular their functions are to be extended into other fields where they are unnecessary. Let us realize that judges and lawyers are endured only because through them greater evils are avoided; the evils of tyranny unbridled by rule, and of confusion unguided by precedent. But to the extent that the services of a special class such as lawyers can be dispensed with, we find the English speaking world calling upon the unsophisticated, impartial, common-place members of the community for the decision of controversies.

Tribute to San Francisco Leader

At a recent meeting the Bar Association of San Francisco paid a notable tribute of appreciation to Judge Jeremiah F. Sullivan of that city, who has just concluded seven years of intensive service as president of that association. "To the task of leadership of this association," the resolutions adopted on his retirement declare, "he brought the spirit of fairness learned upon the bench, zeal and loyalty strengthened in years of active service, civic devotion born of love for the city in which he lives, and the highest sense of professional duty." Mr. Beverly L. Hodghead was elected President to succeed Judge Sullivan; Henry E. Monroe, Senior Vice-President; F. M. Angellotti, Junior Vice-President; Joseph J. Webb, Charles S. Cushing, John F. Davis, A. L. Weil, J. Ed. McClellan and John O'Gara members of the Board of Governors.

PLEADING AND PROCEDURE

In Reforms Under This Head the One Thing of Prime Importance Is to Cut Out Every Unnecessary Mandatory Rule Affecting Progress of Action Through Courts, Leaving All Matters of Convenience and Exigency to Regulation of Judges

By Hon. Stephen H. Allen
Of the Topeka, Kansas, Bar

IT is now fifty years since the British Parliament undertook a sweeping reform of the organization of the courts and of the rules of pleading and procedure in them, yet many of the states of the American Union still cling to most that was bad in the old English rules. Partly because Parliament entrusted the formulation of the rules of procedure to the High Court of Judicature in England, but more, perhaps, because judges are far better qualified than laymen to do this work, many very able lawyers have thought that the best method of reforming our procedure is to first get legislative authority for the courts to make rules and then have the judges formulate them. The concurrence of courts and legislatures is necessary in effectuating reforms by the court rules method.

It requires no argument to convince laymen, Congress and the legislatures of the states, that our systems of procedure in most of the states work badly. The multiplicity of technical, arbitrary rules, that enable the lawyer, who is fighting for time, to delay the administration of substantial justice, is apparent to all who have business in court. Laymen, even more than lawyers are demanding reforms. But the layman does not know just what makes the trouble. Lawyers are the only persons who understand the construction of the court machinery and how it works in detail. They know what are requirements essential to the administration of justice and what are superfluous and harmful. They are the only persons competent to formulate rules of pleading and procedure. Any State Bar Association can select from its own membership a committee of the best qualified men in the state to formulate a code, statute or set of rules, whichever you please to call it. This committee should include able lawyers in active practice, judges of busy trial courts and of the appellate and supreme courts, in order that the work may be viewed from all angles and suggestions made from the widest possible range of experience. The one rule of prime importance to be observed by them in doing their work is to cut out every unnecessary mandatory rule affecting the progress of an action through the courts. Leave all matters of convenience and expediency to regulation by the court according to the exigencies of the particular case. To illustrate my meaning, do away with all requirements that different causes of action can only be joined where they all fall within a particular class, and allow all existing controversies with the defendant to be set up in a single complaint. Allow the defendant in his answer to set up all the matters of defense and all claims of every kind that he has against the plaintiff. Cut out the arbitrary requirement that each cause of action set up in the complaint or the answer must be separately stated and numbered. Let the court require any amendment of the pleadings that appears to be necessary in order that each party be fairly informed of the claims made by his adversary. If it happen that some matters are included that must be tried by a jury, others that ought to go to a referee and still others that should be tried by the court, let the court deal with the whole situation and direct separate trials of such issues, and such only, as cannot be fairly considered together. Arbitrary requirements in the rules of pleading and the various steps to be taken in the progress of a trial serve no useful purpose and cause delay and annoyance.

There are essentials, as to which rigid rules are necessary. Notice that he has been sued, a fair statement of the claim of his adversary, a fair opportunity to set up his defense and counter claims, a fair allowance of time to procure evidence, fair notice and reasonable opportunity to present his evidence and be heard as to both the facts and the law on every matter presented to the court are indispensable to the due administration of justice. As to all these there may well be positive requirements, yet it will still be best in minor particulars to let the court determine what is fair notice and how long a party should be heard in a particular matter.

Reviewing courts are necessary in order to preserve uniformity in the administration of justice and to overcome influences that sometimes affect the decisions of trial courts, but successive appeals from one court to another are an abomination. The appeal from a court of general original jurisdiction should always be to a court that can render a final decision. Where all the evidence is taken down by an official stenographer, as it ought to be in the Federal as well as the state courts, all documentary evidence should be preserved in the hands of the clerk or stenographer and the whole of it should be available to the reviewing court and subject to production before it when occasion requires. It is only in the very rare case of inability of opposing counsel to agree on what the evidence is that it will be necessary to resort to the original documents, but the preservation of them in official hands tends to prevent disputes as to their contents. Ordinarily there is no difficulty in agreeing on condensed abstracts of the whole record made at the trial.

The parts of a code of procedure that require most careful attention are those dealing with the institution and progress of all ordinary cases through the trial and reviewing courts. While the statutory provisions concerning provisional and extraordinary remedies and special proceedings are usually quite voluminous, they are resorted to only in a small percentage of the cases and seldom take very much of the time of the court or seriously delay the progress of the case. The parts of the judicial machine that require the most careful construction are those that are always in action and through which, or some parts of which, every case must pass. It is not my purpose to discuss these in detail. The diversity in the procedure in the different states and the differences in the organ-

ization and jurisdiction of their courts render it quite impracticable to do so within any reasonable limits.

A committee constituted as I have indicated can apportion its preliminary work among its members so that it will not be very burdensome on any of them. The whole committee can then take up the reports of each and make such amendments as they agree on. When they have completed their draft it should be submitted to and discussed by the Bar Association at a full meeting, rather for criticism and suggestion than for final and definite action as to details. These can be most safely entrusted to the committee that has carefully studied the whole draft. When a completed draft is approved by the Association it can be presented to the legislature for enactment into law. It will not ordinarily be difficult to obtain publicity for the scheme during the progress of the work. Lawyers can point out the changes and improvements they are trying to make and gain the support of the press with little difficulty. They will not need to ask the legislature to authorize the courts to do what they think best, but can present a bill for the lawgivers to consider and act on on its merits. When done the work will be that of the legislature, for which those in charge of the bill will be entitled to their due share of credit. When its provisions are explained to them, laymen in and out of the legislature will aid in its passage, without any jealous fear of increasing the power of the courts by vesting them with legislative power.

The committee will of course have to perform most valuable service without pay. The Bar Association will be called on to pay printers' bills and other expenses, which, however, need not be burdensome. In order to encourage busy lawyers to undertake this task let me say, that I made the motion for the appointment of such a committee by our Bar Association, was chairman of the committee from first to last, attended all of its meetings, presented its reports to the Association and discusses its provisions in detail, presented the bill for enactment to each house of the legislature after having gained the support of the governor for it, attended all meetings of the legislative committees at which it was considered and discussed its provisions with such of the members as desired me to do so, yet the simplification of the procedure effected by this revision saved me more labor in just one batch of litigation that I had on hand at that time than all I put in in formulating and procuring the passage of the measure, without reducing my fees by a cent.

Lest it be thought from what I have just said that I claim the revision as my work, I wish to say that the committee, at first of five and afterwards of twelve, was selected from the very best lawyers and judges in the state, whose judgment commanded general respect, that without the aid of the other members of the Committee I could have accomplished nothing, and that many of the best changes were first suggested by members other than myself. I think that each of them gained as I did by the reforms effected.

A full measure of success in reforming court procedure cannot be attained without the sympathetic and whole-hearted support of the courts. This will generally, perhaps universally, be given to any code prepared in the manner I have indicated, approved by the Bar Association and enacted into law by the legislature. This was our happy experience in Kansas. The courts gave effect to the revised code in the spirit of those who formulated it. Some idea of the importance of the reforms accomplished may be gained from the reported cases decided by our Supreme Court. Of the fifty cases reported in Volume I of the Kansas Reports, five were original proceedings in the Supreme Court, and the rest came up on appeal or proceedings in error from the District Courts. Twelve of these were considered on their merits only. In eleven cases both points on the merits and questions of practice were decided. In the remaining twenty-two cases questions of pleading and practice only were considered and fourteen of them reversed, four affirmed and four dismissed. From this it will be seen that at the start questions of practice, that is lawyers' questions, required more attention from the Supreme Court than the questions between the parties, which occasioned the law suits. The cases reported in 77 Kansas were decided in 1908, while the Revised Code was in course of preparation, and there are 192 of them. Of these 117 were decided on the merits; in 13 questions both of practice and merits were considered; six cases originated in the Supreme Court, and in the remaining 56 questions of pleading, practice and evidence only were considered. This means that the Supreme Court considered nothing but lawyers' questions in nearly thirty per cent of the cases.

The Revised Code was enacted in 1909, having been first introduced and failed of passage in 1907. Volumes 111 and 112 contain reports of cases decided in 1922 and 1923. Of those reported in Vol. 111, one case was reversed for error in striking out a plea of *res judicata* set up in the answer, and in one case the court declined jurisdiction in an original proceeding and dismissed the case. All the other cases were disposed of on their merits or want of merits. Of those reported in Vol. 112 a refusal of the trial court to allow the plaintiff to dismiss his action as to one defendant caused a reversal of the judgment as to such defendant, the judgment being affirmed as to the other, and in two cases the rulings of the trial court on demurrers were reversed and the causes remanded for further proceedings. All the other cases were considered on their merits. The decisions in 207 cases are reported in Vol. 111 and the same number in Vol. 112. No appeal was dismissed for failure to observe any technical requirement. From this it will be seen that we are no longer troubled in this state with the scandalous perversion of rules of pleading and procedure into means of delaying and perverting the administration of justice. The Revised Code has now been in force more than fourteen years. Very few amendments have been made to it, none of them of great importance or changing any of its essentials.

Lawyers in the New Parliament

"Though not a few well-known members of the profession have lost their seats, more than one hundred lawyers have been successful at the polls. The new Parliament, so far as can be ascertained, includes seventy-five barristers, and thirty-one solicitors. Many of them, of course, have ceased to be active members of the profession. But the practicing barristers and solicitors are quite numerous enough to disprove the oft-repeated statement that lawyers are not popular, and quite influential enough to be of real service to the community if, in a Parliament that cannot spend its energies on controversial matters, they assist in passing the measures of law reform which the Lord Chancellor had in hand when Parliament was dissolved. A truce to party legislation could not be better utilized than in improving the administration of law."—*The Law Journal*, Dec. 15, '23.

OPINIONS OF THE INTERNATIONAL COURTS

A Department in Which Will Be Reviewed Current Decisions of These Tribunals, With Special Attention to the Opinions of the Permanent Court of International Justice

By MANLEY O. HUDSON
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First Advisory Opinion of the Permanent Court of International Justice.—Nomination of Delegates to the International Labor Conference[1]

A member of the International Labor Organization is not bound to consult the largest employers' or workers' organization where other organizations total more members.

On May 12, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Was the Workers' Delegate for the Netherlands at the third session of the International Labor Conference nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles?" The question came before the Court at its first regular session on June 15, 1922. Briefs were presented to the Court on behalf of the Netherlands Government, the International Labor Office, and the Netherlands General Confederation of Trades Unions. Oral arguments were heard on behalf of the British and Netherlands Governments, the International Federation of Trades Unions, the International Federation of Christian Trades Unions, and the International Labor Office.

At the third session of the International Labor Conference, held at Geneva from October 25 to November 18, 1921, a protest was made against the acceptance by the Conference of the credentials of the workers' delegate named by the Netherlands Government. At previous sessions of the Conference, the workers' delegate named by the Netherlands Government had been nominated in agreement with the Netherlands Confederation of Trades Unions. But the workers' delegate to the third session in 1921 was nominated in agreement with the Confederation of Catholic Trades Unions, the Confederation of Christian Trades Unions, and the Netherlands General Confederation of Trades Unions, though not in agreement with the Netherlands Confederation of Trade Unions. The last-named organization had a membership of 218,596 trade unionists; the other organizations had a total membership of 282,455 trade unionists, though no one had a membership in excess of 155,642.

Article 389 of the Treaty of Versailles requires that non-government delegates to the International Labor Conference be "chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." On October 22, 1921, the Netherlands Confederation of Trades Unions protested to the International Labor Office that the Netherlands Government had not fulfilled this requirement. The International Labor Conference decided to admit the delegate nominated by the Netherlands Government, in spite of this protest. But at the same time the Conference adopted a resolution calling upon the Governing Body of the International Labor Office to request the Council of the League of Nations to obtain from the Permanent Court of International Justice an opinion as to the proper interpretation of Article 389. The Council of the League of Nations therefore acted at the suggestion of the Governing Body in requesting the opinion.

The Court unanimously concluded that the Netherlands Government's nomination had complied with Article 389 of the Treaty of Versailles. The main ground of the opinion was that in a country where there are several organizations of workers or employers, all of these organizations may be taken into consideration in the nomination of a workers' or employers' delegate, and not merely that one which has the largest membership, even though the one may be the "most representative."

This opinion was communicated to the Council of the League of Nations and transmitted by the Council to the Director of the International Labor Office. It constitutes a distinct clarification of the Labor Part of the Peace Treaties, and in the future it will greatly assist the governments in nominating non-government delegates to the International Labor Conference.

Second Advisory Opinion of the Permanent Court of International Justice.—Agricultural Labor and the International Labor Organization[2]

The competence of the International Labor Organization extends to the conditions of labor of persons employed in agriculture.

On May 12, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Does the competence of the International Labor Organization extend to the international regulation of the conditions of labor of persons employed in agriculture?" The question came before the Court at its first regular session on June 15, 1922. Oral statements were made before the Court on behalf of the British, French, Portuguese and Hungarian Governments, and on behalf of the International Labor Office, the International

*EDITOR'S NOTE: This department of the Journal will be devoted to reviewing recent opinions and decisions of international courts, with particular attention to the opinions of the Permanent Court of International Justice which meets at least once each year. Some opinions of international tribunals are not made promptly and readily available to the profession, and even when available they are frequently published in inconvenient form. The editor has selected the professor of international law at the Harvard Law School to conduct the department, and Mr. Hudson will endeavor to survey the current work of international courts in such a way that members of the legal profession may easily keep abreast of it.

1. Reported in Publications of the Permanent Court of International Justice, Series B, No. 1.
The publications of the Permanent Court of International Justice may be obtained from the World Peace Foundation, 40 Mt. Vernon St., Boston, Mass.

2. Reported in Publications of Permanent Court of International Justice, Series B, No. 2.

Agricultural Commission and the International Federation of Trades Unions.

At the first session of the International Labor Conference in Washington, in 1919, it had been decided to place on the agenda of a future session the subject of agricultural labor. At the third session in 1921, three items relating to agricultural labor were included in the agenda. The question of competence was raised before the Conference by the French Government. The International Labor Conference declared itself competent on October 27, 1921, by a vote of 74 to 20. Later the Conference adopted several measures dealing with the protection of agricultural workers. It was the French Government which brought the matter to the Council of the League of Nations in 1922, and this was done without first raising the question in the Governing Body of the International Labor Office.

On August 12, 1922, the Court decided to reply to the Council of the League of Nations that the competence of the International Labor Organization does extend to international regulation of the conditions of persons employed in agriculture. A majority of the judges found the language of the Treaty of Versailles free from any ambiguity on this point. It was said that "every argument used for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries."

Judge Weiss (France) and Deputy-Judge Negulesco (Roumania) declared that they were unable to concur in the opinion given by the Court.

The opinion was duly transmitted to the Council of the League of Nations and by the Council to the French Government.

Third Advisory Opinion of the Permanent Court of International Justice.—Agricultural Production and the International Labor Organization[3]

The competence of the International Labor Organization extends to agricultural production only in so far as conditions of labor are concerned.

On July 18, 1922, the Council of the League of Nations adopted a resolution requesting the Permanent Court of International Justice to give an advisory opinion on the following question: "Does examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like nature, fall within the competence of the international Labor Organization?" The Court was in session at the time this resolution was adopted, and was duly notified of the request. Arguments were heard on behalf of the French Government and the International Labor Office.

The question had been first raised in the Council of the League of Nations by a letter of the French Government of June 13, 1922. The Director of the International Labor Office stated that the International Labor Organization did not claim to have competence as to agricultural production. Negotiations between the International Labor Office and the International Institute of Agriculture had brought a common view to the two organizations as to the proper delimitation of their respective spheres of action.

On August 12, 1922, the Permanent Court of International Justice expressed the unanimous opinion that while the organization and development of "means of production" had not been included in the sphere of the International Labor Organization, it was not necessary that the Organization "totally exclude from its consideration the effect upon production of measures which it may seek to promote for the benefit of the workers." It was made clear that "the consideration of methods of organizing and developing production from the economic point of view is in itself alien to the sphere of activity marked out for the International Labor Organization by Part XIII of the Treaty of Versailles."

This opinion was duly communicated to the Council of the League of Nations and by the Council to the French Government. With the two preceding opinions, it has assisted the Labor Organization to chart its course, and has thus contributed to the easier cooperation of the nations engaged in considering and adopting uniform labor legislation.

Fourth Advisory Opinion of the Permanent Court of International Justice.—Nature of Dispute About Nationality Decrees[4]

The British-French dispute over nationality decrees in Tunis and Morocco is not by international law solely a matter of domestic jurisdiction within paragraph 8 of Article 15 of the Covenant, though nationality questions in general fall within a state's domestic jurisdiction.

On October 4, 1922, the Council of the League of Nations addressed itself to the following item which had been placed on its agenda at the request of the British Government on August 11, 1922: "Dispute between France and Great Britain as to the nationality decrees issued in Tunis and Morocco (French Zone) on November 8, 1921, and their application to British subjects, the French government having refused to submit the legal questions involved to arbitration." The Council took note of "friendly conversations" which had taken place between representatives of the British and French Governments, and pursuant to an agreement between the parties, adopted the following resolution:

> (a) The Council decides to refer to the Permanent Court of International Justice, for its opinion, the question whether the dispute referred to above is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant);
>
> (b) And it requests the two Governments to bring this matter before the Permanent Court of International Justice, and to arrange with the Court with regard to the date on which the question can be heard and with regard to the procedure to be followed;
>
> (c) Furthermore, the Council takes note that the two Governments have agreed that, if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments.

On October 4, 1922, the Secretary-General of the League of Nations transmitted to the Registrar of the Permanent Court of International Justice a copy of the above resolution "for the information of the Permanent Court of International Justice." This was not treated as a request for an advisory opinion under Article 72 of the Rules of Court, but such a request was sent by the Secretary-General on November 6, 1922. The matter was before the Court as a request for an advisory opinion, although at various stages in the proceedings it was referred to by counsel as if Great Britain and France were parties before the Court in a dispute between them.

The arrangements for calling an extraordinary session of the Court were made by the President with

3. Reported in the Publications of the Permanent Court of International Justice, Series B, No. 3.

4. Reported in Publications of the Permanent Court of International Justice, Series B, No. 4.

the aid of suggestions from the British and French Governments. The two Governments fixed upon November 25, 1922, as the date for the submission of cases, and December 23, 1922 as the date for the submission of counter-cases. When the Court met in extraordinary session to consider the matter on January 8, the British Government was represented by Mr. George Mounsey, as Agent, and by the Right Hon. Sir Douglas Hogg, K. C., M. P., His Britannic Majesty's Attorney-General, and the Right Hon. Sir Ernest Pollock, Bart., K.B.E., K.C., M.P., as Counsel. The French Government was represented by M. Mérillon as Agent and Professor de Lapradelle as Agent-Adjoint. Each Government submitted a case and a counter case, and the Court also heard oral arguments from both. The arguments before the Court consumed five days, and during the extraordinary session January 8 to February 7 the Court held twenty meetings.

The dispute had arisen as a consequence of the promulgation by the French Government of decrees converting certain British subjects in Tunis and Morocco (French zone) into French citizens, with the consequence that the French Government began to enforce a liability for military service in the French army. Extended negotiations between the British and French Governments had been conducted before the original communication of the question to the Council of the League of Nations. In these negotiations, Great Britain had relied upon various treaties applying to the French protectorates over Tunis and Morocco, especially the Anglo-French arrangement of September 18, 1897 containing a most-favored-nation clause. But the British insistence had failed to produce any modification in the French decrees, and the French Government had contended throughout that the matter was not open to settlement by diplomatic negotiation.

The argument before the Court was addressed to the single question of the nature of the dispute, and the Court very conscientiously confined itself to the limits of that question. The British Government contended that the existence and abrogation of various treaties were involved, as well as the construction of the terms of such treaties, with the result that the question must be one of an international nature. The French Government contended on the other hand, that "the sovereign right of a nation to legislate upon nationality questions within its own territory governs the situation in Tunis and Morocco under French protectorate as in France itself." It was insisted that the French protectorates in Tunis and Morocco demanded the "progressive assimilation of the customs and laws of the protectorate to those of the protecting country." France refused to admit that there was any limit on her power in this respect as a result of any applicable international engagement.

On February 7, 1923, the Court handed down a unanimous opinion holding that the dispute "is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8 of the Covenant)." In the first place, it was held that the language of the Covenant was not to be given "an extensive interpretation." And the following passage from the opinion of the Court seems to indicate a due regard for the influence which its pronouncements are likely to have on future conduct:

> The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

It was clearly held that a dispute does not achieve an international character merely as a consequence of its being brought before the Council of the League of Nations, nor as a consequence of appeals by a party to the dispute to engagements of an international character. The Court found the Aaland Islands case authority for this proposition. The French protectorates of Tunis and Morocco were examined in great detail, and it was concluded that while a state possesses exclusive jurisdiction in regard to nationality questions in its own territory, it is a question of international law whether such a jurisdiction extends over protected territory as well. The French Government had contended that certain treaties relied upon by Great Britain had lapsed as a result of the principle of *rebus sic stantibus*. This was held by the Court to be a question of international law. The effect of British declarations in the past with regard to Tunis was also found to be involved, and this was clearly a question of international law. Great Britain's reliance on the most-favored-nation clause in the Anglo-French arrangement of September 18, 1897, had also raised a question of international law.

It is notable that the French judge on the Court, Judge Weiss, concurred in the opinion that for these numerous reasons the dispute was not by international law solely a matter of domestic jurisdiction.

When the opinion was announced on February 7, the Agent for the French Government immediately declared that its conclusions were accepted by the French Government and that the French Government desired the case to be submitted on its merits to the Permanent Court of International Justice. This later proposal was not immediately agreed to by the British Government, however. When the Court again met on June 15, 1923, the French and British Governments informed the President of an amicable arrangement concluded between them on May 24, the result of which was to compromise the matter in such a way as to call for no further proceedings before the Court. The French Government had agreed to permit certain British nationals to decline French nationality, on the understanding that the privilege of declination did not extend to succeeding generations. It was stated in the arrangement that neither government would abandon its point of view, nor would the arrangement itself form a precedent for the future. The differences between the Governments, therefore, having lost their practical importance, did not call for further proceedings before the Permanent Court of International Justice.

Judicial Selection in Kansas City

The Kansas City Bar Association has adopted a plan by which it will take a more active part in the selection of candidates for judges of the state supreme court, Kansas City court of appeals, and the circuit and probate courts of Jackson County. The plan was reported by a committee composed of Herman M. Langworthy, Edwin C. Meservey, Joseph A. Guthrie and Robert B. Caldwell, and provides for taking the sense of the Democratic and Republican members of the Bar as to the fitness of judicial candidates for nomination by their respective parties.

DECISIVE BATTLES OF CONSTITUTIONAL LAW

XI. THE SLAUGHTER-HOUSE CASES
(16 Wall. 36)

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

THERE were three of these cases decided in April, 1873, all involving the same question, the validity of an act of the legislature of the state of Louisiana which had conferred upon the Crescent City Live-Stock Landing and Slaughter House Company the exclusive right to receive and slaughter live-stock for the city of New Orleans and certain parishes connected therewith. The right was given to butchers to slaughter live-stock at the slaughter-house established by this Company for a reasonable charge and use of the facilities. The Act was passed by the "carpet-bag" legislature of Louisiana and it was more than suspected that it was procured in part by corruption. Theretofore the landing and slaughter of live-stock had been indiscriminate and unregulated, and however the Act was passed its sanitary purpose was approved by the court; but it was claimed that it created an illegal monopoly, threw many persons out of their occupation as butchers, destroyed their business, and deprived them of their property without "due process of law" under the Fourteenth Amendment. Thus for the first time this Amendment which in the last few years has received almost as much consideration at the hands of the courts as all the rest of that venerable instrument, was brought to the attention of the Supreme Court of the United States. Judge Miller who wrote the opinion, thus notes the importance of the question:

> We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several states to eath other, and to the citizens of the states and of the United States, have been before this court during the official life of any of its present members. (Since 1858.)

He takes up then the question of the object and purposes of the Fourteenth Amendment. He couples it with the Thirteenth and Fifteenth:

> The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal Government; additional restraints upon those of the States. Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

He discusses slavery, its part in the provocation of the Civil War and the history of these Amendments. Speaking of the Thirteenth Amendment, he says:

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government—a declaration designed to establish the freedom of four millions of slaves—and with a microscropic search endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

He then discusses the meaning of the word "servitude" and shows by the word "involuntary" it was clearly intended to apply solely to personal servitude and not to servitude connected with or attached to property. He shows that in spite of this Amendment, many of the Southern States lately in rebellion and recently reconstituted, were passing laws which in effect, reduced the black man to a condition worse than his former servitude. They were forbidden to appear in towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from occupations of gain and were not permitted to give testimony in the courts in any case where a white man was a party. These drastic and unjust laws aroused the party then in control of the government. Judge Miller said:

> These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal Government in safety through the crisis of the rebellion, and who supposed that by the 13th Article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the 14th Amendment, and they declined to treat as restored to their full participation in the Government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.
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> Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two Amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional power granted to Congress these were inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.
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> Hence the 15th Amendment, which declares that "the right of a citizen of the United States to vote shall not be denied by any State on account of race, color, or previous condition of servitude." The negro having, by the 14th Amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union.
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> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the

newly made freeman and citizen from the oppresions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

It had been strongly contended that the amendment by its own terms was not restricted to the negro but was intended to cover every class of persons whether black or white. It had been generally held prior to the Fourteenth Amendment that no person was a citizen of the United States unless he was a citizen of a particular state. Citizenship was a state matter. Each state regulated its own citizenship. That this amendment established a new citizenship, independent of state regulations, was quite clear. Judge Miller shows that these three amendments were parts of a common purpose, the Thirteenth freed the negro, the Fourteenth made him a citizen, placed him under the protection of the Federal Government, and secured his life and liberty from the injustice of the states, the Fifteenth gave him the suffrage. Having thus demonstrated the object and purpose of the Fourteenth Amendment as a part of a comprehensive plan, Judge Miller admitting that the Thirteenth Amendment would cover Mexican Peonage or the Chinese Coolie Labor System if these developed into slavery, says:

> But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished.

He then discusses, at considerable length and with profound fairness, the contention of the plaintiffs in error that the amendment in its beneficent purpose should not be restricted to the colored men alone but that under it whenever a state enactment deprived any individual of life, liberty or property without "due process of law" the Federal Courts should take jurisdiction and declare such enactment void. To which Jugge Miller answered:

> It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection beyond the very few express limitations which the Federal Constitution imposed upon the states—such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the 14th Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Cnogress the entire domain of civil rights heretofore belonging exclusively to the States?
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> All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this Amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.
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> We are convinced that no such results were intended by the Congress which proposed these Amendments, nor by the Legislatures of the States which ratified them.

Having thus, to the satisfaction of the majority of the Court, demonstrated that the amendment in the minds of the people who adopted it was never intended to revolutionize our form of government by entrusting to the Federal power and the Federal Courts, rights that had theretofore been deemed wholly of state jurisdiction, he concludes:

> Whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

It was a five to four decision. Chief Justice Chase, Field, Bradley, and Swayne dissented. The dissenting opinions of Field and Bradley were directed mainly to the objection to the Statute on account of its monopolistic character, that no state could thus grant a monopoly in a particular pursuit. In the light of the vast development of the police power of the state, the general trend of legislative and judicial decisions, the learning they expend on this subject has become archaic. It is a common thing for municipalities to grant monopolies whenever the public health can be best conserved by such grant. They touch but lightly upon the main point in the case, whether the amendment was intended to include all citizens, white or black, but Judge Swayne meets that question boldly. He said:

> These Amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience.

He uses this very striking phrase, "the public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members," and that was essentially true at the time the opinion was written. The Civil War was largely the result of the Doctrine of State Rights carried to a fanatical extreme, the South Carolina idea. During and following the Civil War nationalism had become ascendant and completely preponderant, but in the very hour when Judge Swayne was writing this opinion, the pendulum was beginning to swing the other way. The court of which he was a member from the date of the Slaughter House Decisions, for a period of sixteen years was steadily resisting the encroachments of

federal power and reconstituting those rights of the state which seemed in danger of destruction.

The decision in the Slaughter House Cases was the first of a long line of decisions repelling the aggressions of federal power and centralization and it was not until 1890, when the court had been almost completely reconstituted, that its decisions began to lean steadily, continuously, and increasingly towards aggrandizement of the federal power and the degradation of the states. Judge Swayne continues:

> The provisions of this section are all eminently conservative in their character. They are a bulwark of defense, and can never be made an engine of oppression. The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language "citizens of the United States" was meant all such citizens; and by "any person" was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes and conditions of men. It is objected that the power conferred is novel and large. The answer is that the novelty was known and the measure deliberately adopted. The power is beneficent in its nature, and cannot be abused. It is such as should exist in every well ordered system of polity. Where could it be more appropriately lodged than in the hands to which it is confided? It is necessary to enable the government of the Nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.

Thus the issue was clearly drawn by the opinions of these two great Judges, Miller and Swayne. Miller considered it historically. Swayne considered it literally as though he were interpreting a will or a deed. Miller's method of interpretation was not novel. It is common for courts, in considering Statutes, to take into consideration the circumstances surrounding their enactment, the condition of public affairs, the evil sought to be remedied, and thus ascertain the true intent of the enactment. From the very beginning of the government, the Supreme Court had uniformly held that it would follow the interpretation of a State Statute by the Court of Last Resort of that state. Marshall and his associates constituting what was known as "the old court," strongly Nationalistic, for thirty-five years held to this principle and it became firmly fixed in our jurisprudence. So long as a state preserved its Republican form of government, the National Government could not interfere with its treatment of its own citizens. This, for the plain reason that each state was a sorereignty controlled by its own citizens and it was not to be assumed that the state would willfully oppress any citizen and if it did, the citizen's remedy lay with his own court under his own constitution. If Swayne's interpretation were followed instead of Miller's, the people by adopting the Fourteenth Amendment had revolutionized their form of government. They had destroyed that dignity and independence of the several states of which the founders were so jealous and that balance of power which they so carefully preserved. As Miller suggests, if Swayne's interpretation were the correct one, then in the future all the civil rights of the citizens would depend for their protection upon the National power and the National courts. Can it be thought for a moment in the light of history that those who adopted the Amendment dreamed of such a revolution? Again what was the necessity of such a revolution? For seventy-four years the white citizens of the country had been satisfied with the balance of power as established by the Constitution. They had never thought of appealing to the Federal power unless the Constitution, the laws, or treaties of the United States had been violated by state enactment. The people of each state made their own Constitutions and laws, established their own courts and chose their incumbents. For seventy-four years they had been satisfied with the justice meted out to them by their state courts. At the time this Amendment was adopted, no white citizen was complaining of the oppression of state laws or state courts. The protection of white citizens from state oppression was not in the minds of any human being who voted for that Amendment. It was clearly understood that it was adopted to make a citizen of the negro and to protect that citizenship, no more.

One of the curious things about the case was the personnel of the counsel who argued it. For the plaintiffs in error contending for the Nationalist principle appeared John A. Campbell of Louisiana who had retired from the United States Supreme Court at the beginning of the War because he believed in the extreme state rights idea. For the defendants in error contending for the states rights principle, appeared Matthew H. Carpenter of Wisconsin, one of the ablest and strongest Republican statesmen of that period and Judge Thomas J. Durant, who before the war was one of the leaders of the Louisiana Bar, a strong Union man and the first military Governor of Louisiana appointed by Lincoln. After the War he moved to Washington. He had been seriously considered for the Supreme Bench when Strong and Bradley were appointed. He was a close friend of my father's and I studied law in his office in Washington for two years. He has told me that he learned from a source which could not be doubted, probably one of the Justices, that the discussion among the Judges in the consultation room was the hottest that any of the Judges had ever known, becomnig at times almost bitter especially between Field and Miller.

Another curious thing was that Field, a Democrat was for the Nationalist idea and Miller a Republican was for the preservation of the rights of the states. The decision was bitterly condemned by many of the Northern Republicans and hailed with joy by the Southern states. The manner in which this great decision was quietly annulled without even mentioning it, not reversed but simply destroyed, seventeen years later constitutes the most curious chapter in the history of the Supreme Court of the United States but it must be reserved for a later article.

Fair Notice from Kentucky's Governor

"People may just as well pour water on a duck's back as to expect me to pardon any man who has violated the prohibition laws," said Gov. William J. Fields in an address before the Kentucky Association of Circuit Judges. "A Governor has a political right to give pardons, but he has no moral right to give them for personal or political reason," said the Governor. "It is his moral duty to respect decisions of courts."

"Heaven save labor from the courts!" Mr. Gompers declared some time since. To which the indolent jurist feelingly responds, "Heaven save the courts from labor!"

DUTIES, RIGHTS AND WRONGS

Classification and Definition of Some Fundamental Legal Conceptions—High Time for An Accurate Arrangement and Restatement—Law Is Chaotic in Form Although in Substance It Is Full of Justice and Good Sense

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THE American Law Institute has taken in hand the matter of the arrangement and classification of the law. It is high time that that was done. The substance of our law is in the main very good, full of justice and good sense. But in point of form it is chaotic. Whatever arrangement is adopted, it must, if it is to serve its purpose satisfactorily, be based upon an exhaustive analysis of elementary legal conceptions, and the results of that analysis must be expressed in an adequate terminology, which will necessarily be considerably different from our present legal terminology. Thus, and thus only, can the materials be provided for a good synthesis. In this article I propose to set forth an analysis of some of the most important fundamental legal conceptions. These are especially important in the law of Torts, to which the Institute intends to give attention.

An act, as Austin has explained, is a volitional bodily movement. But the law never commands or forbids acts as such, simple bodily movements. For legal purposes an act is always defined by reference to some of its consequences, which may be called the definitional consequences of the act. "Thou shalt not kill," means, thou shalt not do any act, make any sort of a bodily movement, whose consequence will be the death of another person. That a man must pay his debts means that he must make whatever bodily movements may be necessary to put the money into the creditor's possession. The creditor's possession of the money is the definitional consequence of the act. Therefore the word act is generally used in a wider sense to include the definitional consequence. We may say that an act *stricto sensu* is a bodily movement, and that an act *latiori sensu* is such a movement plus some consequences. A bodily movement may be followed by a series of consequences, and it is possible to take any one of these as the definitional consequence to be included in and definitional of the act in the wider sense, though usually only consequences which are near to the bodily movement are so taken. Thus we may speak of the act of firing a pistol, the act of shooting a man and the act of killing him, three distinguishable acts, which however all include the same bodily movements, but are distinguished by different definitional consequence being referred to. The distinction between direct consequence, for which an action of trespass lay at common law, and indirect consequence, which could be the foundation of an action on the case, seems to have been a distinction between consequences which were regarded as included in the act *latiori sensu* and those which were regarded as following the act but extraneous to it. In certain cases where either trespass or case would lie, it was said that trespass was for the act and case for the consequences of the act. The pleader had the option to regard a certain consequence as direct and therefore included in the act, and to sue in trespass, or as indirect, i. e. as lying outside of the scope of the act and subsequent to it, and to sue in case. The word conduct may be used to include both acts and omissions to act. When the law commands a person to do an act, he will be guilty of a breach of duty if he does not do it. His omission to do the required act, though purely negative, may properly and conveniently be regarded as a kind of wrongful conduct.

A man is subject to a duty when the law commands or forbids him to do an act. The act commanded or forbidden may be called the content of the duty. It is the subject matter of the duty, that to which the duty relates, that which must be described in defining the duty. The acts which form the contents of duties are defined by reference to certain actual or possible consequences, which are the definitional consequences of the duty. A duty is to act or not to act so as to produce certain consequences.

Duties can be and are defined by reference to the actual, the probable or the intended consequences of acts. Thus arises a threefold classification of duties, which is important, among other reasons, because the different classes of duties largely correspond to different kinds of rights, as will be explained below. That classification is as follows.

(1) Duties of actuality, defined by reference to actual consequences.—The duty is to act or refrain from acting so as actually to produce or not to produce certain consequences. To perform a duty of this kind it is not enough that the person subject to it intends to produce or not to produce the definitional consequence, or uses due care or all possible care to that end. He must actually accomplish what the law requires. The duty to pay a debt is of this kind. Nothing less than actually putting the money into the creditor's hands will satisfy the requirements of the duty. Most contract duties are of this kind, but not all. Aside from contract, a person who keeps in his possession a fierce

EDITOR'S NOTE: English legal scholarship has produced a considerable number of comprehensive works on analytical jurisprudence. The number of such books is much smaller in America but such work as has been done is valuable. Of outstanding importance is the treatise, "Anglo American Law," by Henry T. Terry of New York City. Mr. Terry has been a member of the American Bar Association for a number of years. For a quarter of a century he was Professor of Law in the Imperial University, Tokyo, Japan.

In Mr. Terry's treatise on Anglo American Jurisprudence will be found the classification and definitions of legal relations which, more than any other one factor, contributed to the revival of work in analytical jurisprudence in America which began with the path-breaking work of the late Professor Wesley Hohfeld and is now being pressed in a number of our leading law schools.

In this article Mr. Terry restates his classification and definitions of some of the fundamental legal concepts. It is gratifying to have available his further discussion of the subject not only because of its inherent merit and its effect on the development of American legal thought, but also for the light it will throw on the problems of form and terminology which confront the American Law Institute in its effort to restate the common law of the country.—HERMAN OLIPHANT.

and dangerous animal with knowledge of its nature, or in some place a person who makes an artificial reservoir of water on his land, must absolutely prevent it from doing harm; he must do whatever acts are necessary to accomplish this. He is liable if it does harm without any negligence on his part. Some courts have said that in such cases negligence was implied, but that is a useless fiction. Such duties, though not duties merely to use care, and though they may be broken if the person subject to them fails to secure the prescribed result through no fault of his own, are often subject to certain exceptions falling under the heads of inevitable accident, *vis major* or the act of God.

(2) Duties of probability, reasonableness or due care, defined by reference to probable consequences.—The duty is to act or not to act in a way that will probably produce certain consequences. Probability means reasonable probability or unreasonably great probability; so that these duties are duties to act reasonably in respect to the possible consequences of one's conduct. Negligence is conduct which will probably produce harmful consequences, and due care is conduct which will probably not produce such consequences. Negligence and due care are conduct, not states of mind; though negligence is usually, but not always, due to heedlessness or inattention, and due care to heedfulness or attention, which are states of mind.

(3 Duties of intention, defined by reference to intended consequences.—A person must not do any act with the intention thereby to produce certain consequences, e. g. he must not make a false representation with an intent to defraud. So a man must not do any act with the intention to injure another's business, unless the case falls under one of the numerous exceptions to the duty that are connoted in general by the expression "just cause." This class of duties are all negative, to abstain from acts. There are two kinds of intention, simple intention to produce a certain consequence, and such an intention plus knowledge of the facts that make the act wrongful, which latter may for convenience be called culpable intention. For instance, if A is cutting timber on his land, and by mistake as to the boundary line cuts over on B's land, does he intend to cut B's trees? If simple intention is meant, yes. He intends to cut the very trees which he does cut, and they are in fact B's trees. If culpable intention is meant, no. He does not know the fact that renders his act wrongful, the position of the boundary line. He thinks that he is cutting his own trees. There are duties of simple intention, and duties of culpable intention. The duty not to take possession of a thing belonging to another, taking including an intention to take, is a duty of simple intention; the taker is guilty of a breach of the duty although he believes the thing to be his own. But in the case of fraudulent misrepresentation, there must be not only an intention to make a certain representation but also knowledge that it is false, which makes the intention culpable.

A duty of actuality can not be broken unless the definitional consequence is actually produced. But a duty of probability or intention can be broken, although the definitional consequence never happens at all. If a man drives an automobile very fast in a crowded street, so that he will probably run over some one, he breaks his duty, even though in fact no one is injured. There is no actionable tort, because there is no violation of right, but the duty not to do negligent acts is broken. If a person does acts with the intention of inducing a servant to leave his employer in order to injure the employer's business, but does not succeed in doing so, he is nevertheless guilty of a breach of duty. So if a person makes a false representation with a fraudulent intent, but the person to whom it is made does not believe or act upon it.

The word right has four different meanings; there are four kinds of legal rights.

1. Correspondent rights.—When one person is subject to a duty to another to do or not to do a certain act, that other has a right to have the act done or not done. Such a right may be called a correspondent right. Its content, that which must be described in defining the right, is an act to be done or omitted by the other party. If A owes a duty to B to pay him money, B has a right to have the money paid. If A owes a duty not to enter upon B's land, B has a right that he shall not enter. This kind of a right can not be exercised. To exercise a right means for the holder of the right to do or abstain from doing the act which forms its content. But here *ex definitione* that act is to be done or abstained from by the other party. But the right can be violated. It seems to me that this kind of rights are practically of no importance in respect to the arrangement of the law, because they do not need to be discussed separately from the corresponding duties. It would not be necessary to have any separate place in the arrangement where these rights should be enumerated and defined. All that it is necessary to say about them will be said in defining the various legal duties. It is necessary to mention them here, however, because some writers seem to have considered that all legal rights are of this nature, consisting of claims against other persons to have acts done or not done.

(2) Permissive rights.—A person is said to have a right to do or refrain from doing an act, when the law does not forbid or command him to do it. Such rights may be called permissive rights. Some writers have preferred not to call them rights, but liberties. That is a mere question of nomenclature. Certain permissions of this kind have to be noticed and defined for legal purposes, whatever they are called. Calling them rights rather than liberties is more in accordance with ordinary usage. We usually say that the owner of a thing has a right to possess and use it, or that a man has a right to profess any religion that he pleases, rather than that he has a liberty.

The content of a permissive right, like that of a correspondent right, is an act; but it is an act to be done or omitted by the holder of the right, not by some other person who owes him a duty. In fact this kind of rights have no relation to duties resting upon other people, have no duties corresponding to them. Therefore a permissive right can be exercised. When we speak of the exercise of a right, it is usually a right of this kind that is meant. To exercise a permissive right means to do or refrain from doing the act which forms its content, e. i., to make or refrain from making bodily movements which will produce consequences that are definitional of that act. Such consequences may be said to be definitional of the right as well as of the act.

Here a very important distinction should be noticed. An act done in the exercise of a right may produce consequences which are definitional of the right and also consequences which are not definitional of it. Taken in connection with the former consequences the act is an exercise of the right; in connection with the latter, it is not an exercise of the right and may even be tortious. Thus the same act may have a double aspect or character, as being the exer-

cise of a right or being only an act done in the exercise of a right. When a permissive right is a right in a thing, as is the case with property rights which usually include permissive rights to use things, only effects produced upon that thing can be definitional consequences of the right. Effects produced upon other things or upon persons are not definitional consequences of the right; and in connection with such latter effects, so far as it produces them, an act of use of the thing is not exercise of the right. If A is the owner of a pistol, which as owner he has a right to use, and shoots B with it, those consequences of his bodily movement which consist in the movements of the trigger and hammer, the explosion of the powder and the flight of the ball—the discharge of the pistol, are definitional of A's right, his production of them is an exercise of his right of use of the pistol. But the impact of the ball upon B's body and the consequent injury to B, the shooting of B, are not definitional of A's right, and his production of them is not an exercise of his right. As to them his act is only an act done in the exercise of his right.

The plaintiffs had an enclosed field, where they gave exhibitions to which they admitted spectators for pay. The defendant, who had premises just outside of the enclosure from which a view of the plaintiff's exhibition could be had, admitted spectators there, and thus reduced the plaintiff's gains. That was held not to be wrongful; the court said that he was exercising his right in his own premises. That decision was right; but the reason given for it was wrong. The defendant's admission of spectators to his premises was an exercise of his right; the presence of such persons there as he chose to admit was a definitional consequence of his right. But that was not the consequence which was injurious to the plaintiff's and of which they complained. What hurt them was an ulterior consequence of the defendant's act, the pecuniary loss to them. That was not a definitional consequence of any right of the defendants, and in connection with that his admission of spectators to his premises was not an exercise of his right, though it was an act done in the exercise of his right. The defendants had no permissive right to produce such a consequence. The decision should have been on the ground that the defendants had not broken any duty.

The famous maxim *sic utere tuo ut alienum non laedas* means: in doing acts in the exercise of your rights do not produce non-definitional consequences which will be violative of the rights of others.

A permissive right cannot be violated. It is true that the holder of such a right may be prevented from exercising it by some wrongful interference with him or his belongings. The owner of a thing may be prevented from using it by its being stolen or destroyed; or a man may be prevented from exercising his right of going to church by being imprisoned. But in such cases the right violated is a right of the kind next to be described, not the permissive right to act itself.

A permissive right is really a mere negative, the absence of any duty. That being so, it might appear at first sight that as in the case of correspondent rights, there was no need to describe such rights apart from duties. If we had a statement of all legal duties, would it not be enough to say generally that every one might do whatever he was not forbidden to do or refrain from doing whatever he was not commanded to do, and so dispose of permissive rights in a sentence? Theoretically that might be so; and practically it is so in the majority of cases. Many permissive rights would in a systematic arrangement of the law be exhibited in the form of exceptions to duties, and would be treated of under the head of duties rather than of right. For example, every person is subject to a duty not to do any act with the intention of thereby injuring another person's business. But that duty is subject to many exceptions. There are many cases where a person is permitted, has a right, to do such an act, if he has what is called a just cause for doing so, as in many cases of business competition and of strikes of workmen. These exceptions, though really cases of permissive rights would more naturally and conveniently be treated in connection with the duty than in that part of the arrangement devoted to rights. But in many cases it is more convenient to describe directly what a person may do than to get at the same result indirectly by describing what he must or must not do. Most property rights, for instance, comprise permissive rights. The holder of the right is permitted to do acts affecting the thing. It is more convenient to say what he may do, whether for instance he may commit waste, or in case of a bailment in what way the bailee may use the thing, to describe his permissive rights, in that part of the law where rights are treated of, than to put it under the head of duties. An easement is a permissive right. No one would think of describing easements under the head of exceptions to duties. The question how far permissive rights shall be expressly recognized and described as such, and separated from duties, is a pure question of convenience, not of theory.

(3) Protected rights.—The law protects certain states of fact for the benefit of persons. Those states of fact form the content of what may be called protected rights. This kind of rights differ from all the other kinds in that their contents are not acts but states of fact. Thus the content of a person's right of life is the fact of his being alive; the content of his right of reputation is the opinion which other persons have of him, which is a fact; the content of the protected right of ownership includes the physical condition of the thing owned.

The content of a protected right may be a state of fact which already exists, whose existence the law seeks to preserve, as in the rights of personal security and property; or it may be one which the law seeks to bring into existence, as in the right of a creditor to the possession of the money which his debtor owes him, which possession will be a fact. The right is not a right to do an act or to have an act done, but to have a state of fact exist. Of course the state of fact is not itself the right. A fact is one thing; a right in the existence of the fact is quite another thing. This applies also to the acts which form the contents of other kinds of rights and of duties. The act is not the right or duty. A right or duty is a legal relation, an entity created by the law: an act or a fact is not created by the law, and might be done or exist were there no law. The act or the fact is the content of the right or duty in the sense that it is that with which the relation is concerned, the substratum without which the legal entity or relation could have no meaning or existence. To facilitate or to prevent the doing of such acts or to safeguard the existence of such facts is the reason for which the law creates certain legal relations.

A protected right can not be exercised, because there is no act to be done or omitted by the holder of it. But it can be violated. Any impairment of the protected state of fact violates the right. As will be presently explained, an impairment of the protected condition of fact is not a wrong unless it is a consequence

of a breach of duty by some person other than the holder of the right. Therefore the name violation is usually confined to such impairments, and the violation of a right is regarded as necessarily wrongful. That is a mere matter of nomenclature. It might possibly be better to confine the name violation, in accordance with common usage, to such wrongful impairments, and to use some other term, e. g., impairment, when it was desired to include impairments not due to breaches of duty. But it seems to me on the whole preferable to use the term violation in the wider sense just described of any impairment of the protected state of fact. In that sense the violation of a right is not necessarily wrongful.

The law protects protected rights for a person by imposing duties upon other persons, the observance of which by them will, or probably will, preserve or bring into existence the protected state of fact. When a duty is created by the law in order to protect a certain right, the duty and the right correspond to each other. Not all duties correspond to all rights; i. e., a state of fact which the law recognizes as one proper to be protected is not necessarily protected from impairment by any kind of conduct which for any purpose the law forbids, but usually only by some kind of such conduct. Some duties correspond to many rights; others to but few. Some rights have many duties corresponding to them; others few. Thus the right of bodily security or of ownership of a corporeal thing is protected by many duties, by duties belonging to all three of the classes above mentioned. An injury to a man's body or his goods may be an actionable wrong, whether it is produced intentionally or by negligence or sometimes by conduct which is neither intentional nor negligent. But the right which a man has in the goodwill of his business or the affection of his wife has only a few duties corresponding to it, only certain duties of intention. The right which a creditor has to the money due him has no duty corresponding to it but the debtor's duty to pay. So as to duties. There is a very general duty resting upon all persons not to do negligent acts. It corresponds only to rights in persons and corporeal things. But the duty not to do acts with the intention of thereby causing loss or damage to another, or the duty not to make fraudulent misrepresentations, has a much wider range of correspondence. It corresponds to rights in incorporeal things and to the right which is violated by pecuniary loss, which will be described below. There is no general rule or principle for deciding what duties correspond to any particular right or to what rights any particular duty corresponds, though generally rights in persons and corporeal things have more duties corresponding to them than other rights, and duties of intention correspond to more rights than duties of actuality or probability.

This matter of the correspondence between duties and rights has generally been overlooked, because the nature of protected rights and the relation between them and duties has not been clearly apprehended. When a violation of a right has been held not to be tortious because the duty broken did not correspond to the right, it has usually been said that the violation was only a remote consequence of the conduct which constituted the breach of duty. But want of correspondence and remoteness of a consequence are different things. If protected rights are to be recognized in the arrangement of the law and described separately from the duties by which they are protected, as I think should be done, then the matter of correspondence becomes important. A life insurance company can not have an action against a person who negligently kills one of its policy holders, even though the wrongdoer knew that the slain person was insured in the company, so that the pecuniary loss to the company was a probable consequence of his negligent act. But the company can have an action, if the killing was done with a malicious intention to cause a loss to the company. That loss is as direct and proximate a consequence of the killing in the one case as in the other. But the company has no right in the life of the policy holder. The fact of his being alive is not the content of any protected right of the company. The injury to the company is only a pecuniary loss, which is a violation of a very different right; not a right in the slain man such as in some places his wife and children might have in him, but a right whose content is the company's pecuniary condition, of which any impairment of that condition is a violation. The duty not to do negligent acts, even acts which will probably cause an impairment of pecuniary condition, does not correspond to that right; but the duty not to do acts with a malicious intention to cause injury does correspond to it.

When a duty corresponds to a right the consequences that are definitional of the duty are usually the same that are violative of the right. In the duty not to do negligent acts, i. e., acts which will probably cause injury to a thing, the injury is a definitional consequence of the duty; and the same injury violates the right. In the case of intentionally alienating a wife's affections from her husband, the change in her feelings towards her husband is both the definitional consequence of the duty and the violation of the right. But that is not always so. In the case of the duty not to make a dangerous nuisance, the existence of the thing that constitutes the nuisance, e. g., a large quantity of explosives stored in an improper place, is the definitional consequence of the duty. The duty is broken, if such a thing exists. But if it in fact does no harm there is no violation of right. The violation of right, if it happens, is an ulterior consequence of the definitional consequence of the duty. In many statutory duties, e. g., a duty properly to label a bottle of poison, the law specifies some condition of fact as definitional of the duty, which does not involve any violation of right.

In that class of protected rights which are called, somewhat inappropriately, right *in rem*, the state of fact which forms the content of the right is protected against all the world, as the expression is. That is, every person other than the holder of the right is subject to duties which correspond to the right. Some writers have thought that all other persons must be subject to the same corresponding duties, and that, therefore, all the duties that correspond to rights *in rem* must be negative duties, duties to refrain from acts, since there is no affirmative duty that rests upon all persons, there are no acts that everyone is bound to do for others' protection. But that view is wrong. There are negative duties that correspond to rights *in rem* to which every one is subject, e. g., the duty not to enter upon another's land or not to make a nuisance or do a negligent act. But persons in particular situations, into which situations however anyone may come, become subject to affirmative duties which correspond to rights *in rem*. The possessor of a dangerous thing, for instance, must use active care, must do such acts as are reasonably necessary, to prevent it from doing harm to persons or property. Rights of personal security and property are rights *in rem*. Certain other rights are protected only against particular persons, the duties

which correspond to them rest and can rest only upon particular persons, not upon persons generally. These are rights *in personam*, i. e., *in personam certam sive determinatam*, as Austin says. In the civil law such a right together with its corresponding duty, the relation between two specific persons consisting in a right on one side and a corresponding duty on the other, is called an obligation. A contract right and duty are the best example of an obligation; but there are also non-contractual obligations. Equitable rights and duties are obligations.

Rights *in rem* are few in number, and can be defined by describing the states of fact that make up their contents without referring to the corresponding duties. In brief they are as follows:

(1) Rights of personal security, whose contents are conditions of the person himself who has the rights. These include sundry sub-rights:

(a) The right of life, whose content is the fact of being alive.

(b) The right of bodily security, whose content is: first, absence of contact with anything else. Any contact of anything with the body violates this right, e. g., it is a battery to lay a finger, however, gently upon another, unless the case falls under some exception to the corresponding duty, in which case the act is not tortious, though the contact nevertheless violates the right. Secondly, the right of bodily security relates to the physical condition of the body, every change in that condition, mutilation, sickness, pain, violates the right.

(c) The right of mental security. There is no general right of mental security. Generally the law does not attempt to protect persons from painful or disagreeable mental experiences, such as fright, mental suffering or disgust. But there are some limited rights of mental security, whose content is the state of freedom from such mental experiences, e. g., the right that is violated in an assault without battery, where the apprehension of injury constitutes the violation of the right. If there is a right of privacy, it falls here.

(d) The right of liberty, whose content is the absence of certain kinds of restraint.

(e) The right of reputation, whose content is the good opinion that others have of a person.

(2) What may be called protective rights, whose contents are conditions of other persons. Such are the rights which a husband has in his wife against other persons, e. g., his rights in her consortium. His rights against her, the duties corresponding to which rest upon her, are obligations, e. g., his right to her obedience—if husbands have any such right now-a-days.

(3 Rights of property, whose contents are the conditions of corporeal things, and certain conditions of fact which are usually regarded as conditions of incorporeal things. All the other rights *in rem* here mentioned are protected rights only; but property rights include also permissive rights, and sometimes facultative rights, which will be presently described. Ownership or dominion is a complex group of protected and permissive rights.

(4) There is still another right *in rem* for which our law has no name. For convenience I shall call it the right of pecuniary condition. Its content is the total value of a person's belongings. Pecuniary loss is a violation of this right. What the civilians call *damnum emergens*, the loss of a value which one had, is always a violation of his right. As to what they call *lucrum cessans*, the being prevented from acquiring a value, there is some confusion and uncertainty. There are various rules as to when pecuniary loss is presumed, e. g., the rule that the violation of any right imports damage.

This right of pecuniary condition is usually not distinguished from the right of property. Property has been divided into property in possession, property in action and property which one has a special right to acquire. The last division perhaps is meant to include this right. But the distinction between the rights of property and of pecuniary condition, and the recognition of the latter as a separate right, are important, because the two rights have different duties corresponding to them. Many acts and omissions which are undoubtedly breaches of duty amount to torts if they cause violations of property right, but not, if they merely cause pecuniary loss without any interference with property. Most duties of all the three classes above mentioned correspond to property rights, but for the most part only duties of intention, and not all of these, correspond to the right of pecuniary condition. That is, generally, but with some exceptions, a negligent act, if there is no injury to property, does not amount to a tort if it causes a pecuniary loss, whereas an act done with an intention to cause such a loss, and actually causing it, is tortious, unless the case falls under some exception to the duty. These exceptions, however, are numerous; it is not always tortious intentionally to inflict a pecuniary loss upon another. Rights of property in corporeal things relate to the possession and physical condition of the thing, not to their value; the right of pecuniary condition relates to value. A person may have many separate property rights in different things; he has only one general right of pecuniary condition.

(5) Facultative rights. A facultative right is a power to do something which without such a power it would be legally impossible for the person to do, e. g., for a number of persons to form themselves into a corporation. These rights differ from permissive rights in that a permissive right is a right to do something that would be possible to do without the permission, though it might be unlawful, while a facultative right is to produce a legal consequence which it would otherwise be impossible for the actor to produce. Some of these rights, like powers of appointment, can be exercised by their holders by their own acts merely, while others, like maritime and equitable liens, require the aid of a court.

The elements of a wrong are as follows, i. e., of a civil injury; a crime may consist of a mere breach of duty without any violation of right.

(1) There must be a breach of duty. A violation of a right, e. g., injury to a person or thing or pecuniary loss, does not amount to a wrong, if it happens otherwise than as a consequence of a breach of duty, as usually when it is the result of mere accident.

(2) There must be a violation of right. A mere breach of duty which does not cause any damage is not a wrong.

(3) The duty broken must correspond to the right violated.

(4) The violation of right must actually be the consequence of the breach of duty.

(5) It must also be in the legal sense the proximate consequence. A consequence may be the actual consequence of a certain cause without being legally proximate to it.

When the wrong is complete further violations of right may happen as consequential damage. Such damage is not a part of the wrong, but is extraneous and additional to it. It may, if proximate, be recovered

for in an action for the wrong. A right whose violation amounts to consequential damage need not correspond to the duty broken in the tort. Pecuniary loss may follow a negligent injury to a person or to property and be recovered for as consequential damage, although the duty broken, a duty of due care, did not correspond to the right of pecuniary condition.

The foregoing analysis indicates an arrangement for a part, though not the whole, of the law. There should be an introductory division containing definitions of elementary conceptions, such as act, duty, right, wrong, fact, presumption, intention, malice, probability, negligence, possession and various others. Rights *in rem* should form the content of another division. Under property should be described those permissive and facultative rights which are classed as property. Then should follow duties corresponding to rights *in rem*. These duties should be described separately from the rights, because they are capable of such description, and some duties correspond to many rights. It would be more convenient to describe such a duty once for all in one place. In connection with each duty should be mentioned the rights to which it corresponds. Duties are subject to various exceptions. An exception which applies to only a single duty should be treated of in connection with the duty. Thus the exceptions to the duty not to publish slanders or libels, which fall under the head of privileged communications, should be stated in connection with that duty. But there are certain more general exceptions that apply to many duties, for instance, many permissions to do acts usually wrongful under some authority or for the purpose of defence or protection or by virtue of a license. These should be discussed in a separate subdivision following after duties.

The distinction between rights and duties, between the states of fact which the law protects and the acts which must or must not be done to conserve those states of fact, is very important. It must form the basis of a large part of any scientific scheme of arrangement. It may be illustrated by the case of slander and libel. The content of a man's right of reputation is the good opinion which others have of him. That can be impaired by the publication about him of certain kinds, not all kinds, of false and derogatory statements. Under the right of reputation, therefore, should be explained what kinds of false and derogatory statements are considered to impair his reputation so as to violate his right. In connection with this would fall to be discussed the meaning of such statements; is the intended meaning to be taken as the legal meaning, the meaning that the publisher of the words meant to convey by them, or the accepted meaning, the meaning which the persons to whom they are published supposed them to have, or the reasonable meaning? Also the question what is publication belongs here. Under the corresponding duty not to publish such statements, it would be necessary to discuss whether the publication must be intentional or whether a publication by mere negligence, or even without either intention or negligence, is sufficient for a breach of the duty. Also when the derogatory meaning of the statement depends upon extraneous facts, as it sometimes does, must the publisher be aware of these facts? It is plain that the state of mind, the intention or knowledge, of the publisher, or his negligence, are things quite distinct from and independent of the opinion which others have of the calumniated person, and pertain not to the latter person's right, but to others' duties toward him.

In the case of obligations the discussions of the rights and of the duties can not practically be separated from each other. The contents of rights *in personam* are not a few states of fact defined by law and capable of being taken up one by one and described fully, but are very numerous and varied. The same is true of the acts which form the contents of the corresponding duties. In a contract, for instance, the parties create such rights and duties as they please. Moreover, the reason for describing the rights *in rem* and their corresponding duties separately, that the same right may have various duties corresponding to it and the same duty may correspond to various rights, so that repetition is avoided by describing each right and each duty once for all in one place, does not exist in the case of obligations, where each right has only one duty corresponding to it and each duty corresponds to only one right. Also the right and the duty arise from the same source or transaction, e. g., the same contract that makes the right creates the duty. Therefore obligations are most conveniently arranged, not according to their contents, as are rights *in rem* and their corresponding duties, but according to the source or manner of their origin. They may be created by statute, by custom, by contract and by various acts and transactions either *inter partes* or *ex parte*, which are not properly contracts. Some of such transactions are often called *quasi*-contracts or contracts implied in law, both of which names are misnomers and should be dropped.

In the arrangement of the law after rights *in rem* and their corresponding duties there should follow a division devoted to obligations.

After duties and rights were disposed of, a division of the law should be devoted to wrongs. Since a wrong is a breach of duty which produces a violation of right, the greater part of the subject of wrongs will already have been treated of under the heads of duty and right. When the question whether a wrong has been committed arises, it usually relates to whether a duty has been broken or a right violated. Therefore, this division of the law would not be large. Here, however, would fall the rules that there must be both a breach of duty and a violation of right, and that the duty broken must correspond to the right violated, and that the violation of right must be the actual and proximate consequence of the breach of duty.

Also certain particular wrongs, which are distinguished by special names, such as trespass or conversion, may be committed by breaches of various different duties and violations of various different rights. The description of such wrongs would belong here, so far at least as to name the duties and rights whose breach or violation may be elements in the particular wrong. Also in some wrongs, it is necessary not only that a certain particular right be violated, but that it be violated in a particular way. That is true of conversion. The right violated in a conversion is the right of property; but not every violation of that right is sufficient for that particular tort. The peculiarities that distinguish the tort called conversion from other wrongs involving breaches of the same duty and violations of the same right must be mentioned here.

For a Declaratory Judgment Law

Declaratory judgments were approved in resolutions adopted in the eighth annual session of the Federation of Local Bar associations, third supreme judicial district, convened in Decatur, Illinois, with recommendations that the bill for such legislation before the last general assembly be redrafted for consideration by the next state legislative body. J. L. Deck was named president of the Federation.

ASSOCIATION OF AMERICAN LAW SCHOOLS

Attention of the Twenty-First Annual Meeting Was Concentrated Largely on Extension and Alteration of the Curriculum and on Questions of Legal Research

By Sydney K. Schiff

THE twenty-first annual meeting of the Association of American Law Schools was held in Chicago during the last week in December; in attendance were one hundred sixty-five representatives from fifty-two member schools, and several teachers from non-member institutions. Two schools, the Mercer School of Law and the Law School of the University of Wyoming, were admitted to membership, and in pursuance of its policy of recognizing part-time schools which are complying with the Association's standards, the part-time schools of the University of Southern California and of George Washington, whose full-time schools are already members of the Association, were approved by the Executive Committee.

It is impossible within the limitations of this report to do more than to catalogue the papers and discussions of the chief participants. Since most or all the papers will be published in the legal journals or periodicals within the year it was thought better to indicate the work of all the conferences than to attempt to report in any detail on any particular phase of the meeting.

The attention of the meeting was concentrated largely on the extension and alteration of the curriculum and on questions of legal research, chiefly as they are connected with the restatement of the law being undertaken by the American Law Institute.

Suggested changes in the curriculum involved not only the alteration of existing courses now taught in the orthodox law schools but the extension of the period of schooling, with the addition of new courses. President Jones' address directed attention to the uses to which the Summer Session can be put; it could be made to serve as a place for practical training in such courses as abstracting and the drafting of legal documents, serving a purpose akin to that of the medical school clinic; to it would be attracted the younger practicing lawyers who desire to continue or diversify their training, much as agricultural or engineering schools permit of practical use; as a forum for the discussion of local problems, entered into by both Bench and Bar, the session would develop local opinion on current problems. In the discussion of the President's address, Dean Bates of Michigan pointed out the development of two types of law schools, the national type, whose personnel is drawn from wide areas and whose purpose is not to teach merely the law of that jurisdiction wherein it exists, and the local type. To the former, many of President Jones' suggestions would be inapplicable, though they might well be adapted to use in the latter. Objecting to the Summer Session as an attempt to shorten a course now not sufficiently long and to present difficult material in a few weeks, Dean Fraser of Minnesota criticized the idea as an unwelcome interruption in a law course planned to utilize three academic years.

To the Conference on Jurisprudence and Legal History was presented the problem of teaching Roman Law in the ordinary curriculum. Professor Yntema in urging that a course in Roman Law ought to be given, stressed not merely its integral worth, but its value as a tool for correlating legal ideas and as a device to bind separate but related subjects. Professor Page questioned the practical importance of such a course as a rival to Mortgages, for example, but admitted its traditional worth. It was rather the Roman Law after Justinian than before which Professor Yntema thought would best serve the purpose indicated, while Professor Freund suggested as a more effective means the Modern Civil Law rather than the Roman, either pre or post-Justinian.

Attacking the problems of research, papers were read by Professors Oliphant and Bordwell, the former analyzing the two-fold labors of the law teacher—the passing on of accumulated legal wisdom and the search for new ideas or better methods—and emphasizing the desirability of research by persons trained in legal technique in the related and overlapping field of economics, the latter arguing that the labor of instruction ought to be lessened to permit of a fuller and freer opportunity for research.

Professor Bohlen read a most stimulating paper before the Conference on Wrongs on the function of court and jury in negligence cases in which he suggested the likeness of the function of the jury to that of an administrative board, insofar as each determines whether or not the offensiveness of the defendant's conduct is such as to confer rights on the plaintiff in view of the existing social mores. Pushing the analogy further Professor Bohlen pointed out that the existence or extent of rights created by negligence would vary as the social utility of the defendant's conduct varied; hence the finding of the fact of negligence can vary on the same operative facts. And a court, when it takes a question of fact from the jury, ought to regard itself in the light of such an adjudicator as the jury would have been, evaluating the defendant's conduct in view of present social standards.

That the teaching of criminal procedure ought to be a course separate from a course in Criminal Law, that it ought to be taught in the Senior year, and that its content should be the local law of procedure were the significant points in Professor Perkins' discussion.

The functional treatment of legal material was admirably illustrated in the Commercial Law Round Table where certain fundamental legal ideas were studied solely as risk-apportioning devices and where the relevant concepts of the orthodox courses were gathered in an attempt to discover the standards to determine the person of incidence of the risk. The relation between title and risk was discussed by Professor Crane, while Professor Vance outlined the risks which can be guarded against by insurance. After suggesting some of the nice problems of the risk of forgery or alteration of negotiable instruments Professor Woodward summed up the attitude of the law (especially in re checks) in choosing the person to bear the loss as between the bank, the depositor, and an innocent purchaser. To the risk of the unavail-

ability or increase in the price of labor, a business risk which has been as yet but little dealt with directly, Professor McGovney devoted some interesting discussion which it is to be hoped will lead to greater clarity of thought on the subject.

In order to add a practical touch to the problem of the operation and effectiveness of strike injunctions the Equity Council secured Mr. Dudley Taylor, for twenty years connected with labor litigation in Chicago, to discuss the efficacy of the use of the injunction. Mr. Taylor's account was rather a commentary on the labor situation than a weighing of the worth of the injunction remedy as compared with other methods, but he made cognoscible the employer's side of the mooted question of the permissibility and utility of the strike injunction.

Most directly affected by the proposed restatement of the American Law Institute was the Conference on Business Associations. Dean William Draper Lewis, Director of the Institute, outlined the problems encountered in a restatement of the Law of Business Associations. There were discussed the practicability of grouping several business institutions under one division, and the tests or incidents of each by which lines of demarcation could be created. Under the gavel of Professor Mechem the discussion revolved about changes desirable in the theory or nomenclature of the Law of Agency; Professors Seavey and Keedy pointed out various irritants in the ordinary statements of Agency law and suggested that those statements be so altered as to clarify thinking by a more direct attack and lucid phraseology.

Before the Round Table on Remedies Professor Scott presented the attempt at Harvard to make the teaching of pleading subservient to the instruction in substantive law, thereby lessening the stress on pleading for its own sake and bringing it into a closer liaison with the substantive law courses. Another innovation in the utilization of pleading material is Professor McCaskill's effort at Cornell to correlate common law, equity, and code pleading into one course, developing particular topics rather than specialized systems. In the session on Public Law, Professor Cook analyzed the "Fundamental Concepts in the Conflict of Laws"; emphasizing inter alia the enforcement of rights created by events occurring beyond the enforcing jurisdiction, and stressing the point that in enforcing such rights a state is not giving effect to foreign law but that it is enforcing a local right, homologous to the foreign, created by the foreign facts. The Round Table on Property reviewed the background of the English Law of Property Act, and under Professor Vance's direction discussed the existence of tenure in the United States and the desirability of legislation thereon.

Before a general meeting of the Association Dean Pound spoke on the problem of classification of the law in a most stimulating address. After comparing various methods of classification used by Roman and Civil lawyers, Dean Pound summarized Anglo-American attempts at analyzing the body of the law, and suggested the classification he has worked out. Following the address was a spirited discussion which emphasized the difficulty of the task undertaken.

At the last general session Professor Takayanagi of the Imperial University of Tokio, who is in this country on a mission to aid in the restoration of that institution's libraries, told of the disastrous losses inflicted on the resources and libraries of the Imperial University: of 800,000 volumes there were lost 550,000, and of the Law Library of 100,000 volumes but few remain. Since more Japanese students are now studying Anglo-American law than are studying either the French or German, aid is urgently needed: to this end several law schools have donated sets of State Reports and of periodicals, and the Association by resolution suggested that the law publishers donate whatever surplus or unneeded books or periodicals they may have.

The Constitution was amended so as to provide that "A part-time school must maintain a curriculum which, in the opinion of the Executive Committee, is equivalent to that of a full-time school. No school shall be or remain eligible to membership if the institution of which it is a part shall through any other agency conduct instruction designed to prepare students for admission to the Bar or for Bar examinations, save in conformity with the provisions of the preceding paragraphs."

For the coming year William Draper Lewis of Pennsylvania was elected President and Ralph W. Aigler of Michigan reelected Secretary-Treasurer. To the Executive Committee were elected H. C. Jones, O. K. McMurray, and A. W. Scott. The Executive Committee had under consideration the choice of Denver for next year's meeting, and in addition the Association directed the Committee to consider the appeal made by the St. Louis representative, Professor Conant, for convening in that city.

University of Chicago Law School.

Increase in Imprisonment for Debt

"One of the most striking facts in the Report [of The Prison Commissioners] is the increase in the number of persons imprisoned as debtors or on civil process. Imprisonment for debt is supposed to have been ended by Dickens, but since then it was for many years a leading feature of county court process. In this respect county courts have undergone a very marked improvement, and short of being abolished altogether, imprisonment of this kind has reached, perhaps, the lowest possible figure. The increase in the last few years—from 1,830 in 1918-19, to 9,267 in 1921-22, and now to 12,995 in 1922-23 is due to non-payment of wife maintenance, bastardy arrears, or arrears of income tax. The Commissioners, while considering that in many cases committal is unavoidable and right, nevertheless appear to regard the process with doubt. A good many, it seems, pay as soon as thy find themselves in prison; rather, we imagine, their friends have to find the money for them. But otherwise there is only expense to the taxpayer, with no resulting good to anyone. 'The taxpayer maintains them, and the creditor, or the woman who is in need of support, usually gets nothing.' The greatest absurdity is in improvement for non-payment of income tax. The gain to the State must be negligible. Then, again, there is the failure of justices to allow time for payment of fines. Out of the 15,861 persons who were committed in default of paying fines, 12,233 are recorded as not having been allowed time to pay. As we have said, the Prison Commissioners by calling attention to these facts can exercise a salutary, though indirect, control over the volume of imprisonment."—*The Solicitors' Journal & Weekly Reporter*, Dec. 8, '23.

The Changing Profession

(*Continued from page 100*)

a Cassat, and helped him steer his course to success, oftentimes over the prostrate bodies of trade rivals. The day of that sort of warfare has almost wholly passed, and in its place has come an era of great, democratically-owned enterprises, as to which the directors, executives and counsel act in a representative, fairly fiduciary capacity for many thousands of owners of the property and business.

For illustration: the great American Telegraph and Telephone Company—the Bell telephone system—is owned and controlled by 270,000 stockholders—as large a body of men and women as comprises the population of a city such as Denver or Providence.

Not many years ago, the great business of Armour and Company was commonly thought of as the proprietary enterprise of a single family. Today its business is owned and controlled by about 77,000 shareholders, of whom about 40,000 are employees who have invested their own savings in the business. Of the 77,000 stockholders, only 83 own 500 shares or more; 69,664 shareholders own less than twenty-five shares each.

The Pennsylvania Railroad Company is owned by 138,500 shareholders, whose average holding is only 72 shares per individual owner. The New York Central Railroad Company has about 38,000 shareholders. The General Motors Corporation has about 65,000 shareholders. The United States Steel Corporation has about one hundred thousand shareholders. A single public utility corporation in New York City has more than 60,000 shareholders. In all of these large enterprises, the average holding is small—less than 100 shares—and a large part of the stock outstanding in individual hands is the property of persons owning only a few shares each.

This democratization of the ownership of the great public enterprises has even a broader aspect than the stock ownership. The Class I railroads of the country are owned by 777,132 stockholders, according to the figures of the Interstate Commerce Commission, in addition to more than a million bondholders (the exact number is not ascertainable). The holders of these stocks and bonds are scattered throughout the United States and several foreign countries, and, on the basis of shares of a par value of $100 each, the average holding of each stockholder in the Class I railroads is 93.2 shares each. Among the larger holders of railroad securities are of course the insurance companies and the savings banks, for their respective policy-holders and depositors. This means that in addition to more than 1,750,000 stockholders and bondholders in Class I railroads alone, the holders and beneficiaries of 17,663,000 life insurance policies and of 54,096,000 industrial insurance policies, as well as 9,619,000 depositors in savings banks, have a proprietary interest in the properties and operations of the railroads.

Consequences of This Real Democratization of Ownership

I wish I had time to dwell in more detail upon this development of genuine public ownership and control of these great companies, and the effect upon the attitude and relationship of their executives and counsel toward matters having a public relationship. Here has come about a public ownership which is real, substantial, enduring, and not political, controversial or experimental. Officers of an enterprise so widely owned by the rank and file of the people cannot fail to take the public interest into account in vital decisions, and the services of counsel take on a *judicial* aspect, although in a private capacity.

2. *Is the lawyer losing his individualized professional status and prestige?*

Answer to this query would be an ample subject in itself, and time forbids me to do more than refer to it. For one, I do not think that any such thing is taking place. For membership in the profession, a better preliminary training is imperatively required and is now more generally received. The lawyer generally has a right to feel that he is rendering a better and more useful service to his clients. For reasons I have already indicated, he has gained in independence as well as in functions. He has become a creative and constructive factor; he no longer needs to feel that he lives and profits primarily from other men's disagreements and misfortunes.

The Era of "Specialization" Is Passing

From my own observation, the tendency, manifest and regretted a few years ago, to force young lawyers to "specialize" and to shelve them in some niche or alcove of a large office, is not nearly so general today. It is found that first-class results require that all work be done by men of a broader experience and ability than this specialization produced. Many offices now refuse to permit their men to work exclusively in a single field of the law—even in such fields as taxation and estate work, which once seemed certain to be turned over to men who did nothing else. The modern law office places at the service of clients a more dependable product—the result of the work and discussions of several men, not of one man only. There is an insistence on a standard of quality and a certainty of conclusions which ordinarily can best be secured through a co-ordinated and co-operative handling. The expeditious handling of modern law business cannot be left to depend on the presence or absence, the health or sickness, the other engagements or the idiosyncrasies of any individual. There must be continuity of policy and treatment, as well as promptness of dispatch. These factors have already forced a better organization of the lawyer's office in the larger cities, and are forcing the same thing, on a smaller scale, upon their brethren in the smaller cities and the villages. For one, I do not believe the American lawyer has lost independence, dignity or prestige by the change.

3. *Is the American lawyer showing himself a mere adherent of "things as they are," or is he dealing with the newer conditions in a spirit of enlightened progress?*

If I were asked to state the reasons why, in the present transitional period, there is far less of popular antagonism to the legal profession than formerly, I would say that, *first*, as I have shown, the lawyer is adapting himself to the requirements of the new conditions; *second*, American lawyers identify themselves as freely with so-called radical and liberal movements as with conservative alignments; names like those of Clarence Darrow, Frank Walsh, Felix Frankfurter, William E. Borah, Francis J. Heney, Newton D. Baker, Hiram W. Johnson, Edward B. Whitney, William J. Bryan, Joseph W. Folk, Herbert S. Hadley, Robert M. La Follette and Morris Hillquit readily occur

to you among active practitioners, as do the names of jurists such as Oliver Wendell Holmes, Jr., Louis D. Brandeis, Cuthbert W. Pound, Benjamin N. Cardozo, Learned Hand, Charles E. Hughes, William S. Kenyon, William Draper Lewis, William H. Moody, I. Maurice Wormser, Albert J. Beveridge, Roscoe Pound, Samuel Seabury, John W. Winslow, and others who have been exponents of what, for lack of more accurate phrase, is commonly called a liberal, forward-looking or progressive concept of the law; *third*, American lawyers have shown a disposition and ability to put their own houses in order, raise high the educational and ethical requirements for admission to the profession, prescribe lofty standards of professional ethics, and to resolutely enforce them; and, *fourth*, American lawyers are militantly leading several important campaigns in which the American business man and the American public are mightily interested, such as

(1) The better administration of justice, the elimination of the law's delays, and the clarification and re-statement of the common law;

(2) The securing, through State action, of uniform laws on all subjects of Nation-wide importance to industry, business, and the rights of citizens, within the jurisdiction of the several States, thus arresting a tendency to force an unwieldy centralization of power in Washington through the enactment of Federal laws on these subjects;

(3) Resistance to the tendency to over-regulation of the affairs of persons and property, and to the enactment of too many statutes on subjects better left outside the domain of legislative prescription; and

(4) The education of new voters and foreign-born citizens in the essentials of citizenship and the fundamentals of our Constitution and laws, along lines personally directed by the President of the American Bar Association, Mr. Robert E. L. Saner, of Texas.

Lawyers as Champions of "Popular Rights"

The fact is that the American lawyers are everywhere most zealous in championing, defending, and seeking to serve the rights of persons as well as of property. The growth of the Legal Aid Societies, the creation of public defenders in many localities, the formulation and enactment of supposedly humanitarian statutes, such as the anti-usury laws, the emergency rent and housing legislation, the provisions compelling the compensation of workers for industrial accidents, regardless of their fault or their employer's fault, the statutory schemes for maternity compensation and old-age insurance, the diligent regulation of utility rates, taxicab fares, grain-elevator charges, cotton-gin charges, the prices of binding-twine, etc., are instances of zeal for the supposed interests of the masses of the people. Lawyers have formulated these measures and fought for them; other lawyers have opposed them and doubted their wisdom.

Sometimes it has seemed that political considerations lead to over-zeal, and make it easy to mistake the supposed *interests* of the many for their *rights*—a mistake which prompts drastic concessions to the supposed desire of many people to compel others to give them something for nothing, or for less than cost. Be that as it may, the popular movements which champion human rights, and seek to distinguish them from, and elevate them above, the rights of property, find no dearth of able advocates and leaders in the ranks of our representative Bar.

But complaint is sometimes made against the lawyers that they invoke the Constitution and obtain injunctions, to protect property rights from invasion by legislative enactments or regulatory orders. As a member of the Bar who has often invoked the equity powers of the courts for such purposes, in proceedings where I have always found a host of lawyers diligent in preventing such an exercise of judicial powers unless the facts were found to warrant and require it, I may not be an impartial and disinterested analyst of this complaint, but I am bound to say that I do not think the Bar need resent such a charge. *Whose* property rights are protected? The rights of the hundreds of thousands of small investors in the menaced enterprise. *These modest investments represent the savings against old age and disability, the sums put away to send sons and daughters to college, the wage-worker's share in the prosperity of the business he has so long served.* Back of the fiction of the corporate ownership of the menaced property stand *the great numbers of men and women who are its real owners.* Their happiness and their savings, their well-being and their modest provisions for their future, are in jeopardy and are at stake, when it is proposed by regulatory action to confiscate and destroy the property by depriving it of all earning power. In a very real sense, the so-called rights of property are found, upon analysis, to be nothing other than the rights of the people in their property.

To the young men in the law schools, what do these changes and present-day conditions in the legal profession portend? I believe they hold out to the young man in the law a more attractive opportunity than ever before offered in the history of English law. These changes must also bring a serious recognition of the required standards of achievement under such conditions. The larger rewards—by which I do not mean money—are for those who thoroughly prepare themselves, before admission and even afterwards, for an honorable and useful place in the profession.

I have not painted a great deal of the other side of the picture—its unattractive, and, I hope, transitory aspects. I would not suggest that all that is taking place is good, or that the Bar has arrived at any counsel of perfection. In noting progress and expressing satisfaction, we may not overlook the continued presence of much which the Bar has reason to regret, and incentive, also, to try to remove.

In closing, may I quote what has been said, with rare felicity, but with far too great modesty as to his own participation in what has taken place, by Judge Cardozo, in the final paragraphs of his book on "The Nature of the Judicial Process":

> Ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected, or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.
>
> The future, gentlemen, is yours. We have been called to do our parts in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.

"AND ZELOPHEHAD HAD DAUGHTERS"

An Early Declaratory Judgment in Which the Property Rights of Women Marrying Outside of Their Tribe Are Clearly Set Forth—Binding Character of Judgment Subsequently Recognized—General Satisfaction with Procedure

By Henry C. Clark
Of the Washington, D. C., Bar

ZELOPHEHAD belonged to the most illustrious of the families. His grandfather was Gilead, his great, great-grandfather was Manassah, who was one of the sons of Joseph and a grandson of Jacob.

Within the thirty-ninth summer of the wandering of the tribes of Israel, Zelophehad passed away and was with his fathers. In the plains of Moab he died and was buried. After him it was written by Ezra the scribe, with a cold, significant finality: "and Zelophehad had daughters." (I Chron. VII, 15). This scribe makes no further mention of either father or daughters.

The land of Canaan was to be divided among those who were numbered. In making the enumeration daughters were not counted. Therefore under the law Zelophehad's daughters could expect no inheritance—the family of their father must be looked upon as extinct, and written childless, though he had five daughters.

These young women found themselves in a serious predicament. Why should daughters, because of sex, be deprived of an inheritance in their father's property? Were they rightless? Must they stand by and see strangers take possession of that which had been their father's?

Zelophehad's daughters determined to claim and fight for the right to inherit their father's estate. They brought a suit in court before the end of the thirty-ninth year of the wandering of the tribes. This suit is noteworthy, among other reasons, as one of the earliest reported law suits. Its date is more than three thousand years ago, and seven or eight centuries before the founding of Rome.

Moses sat as chief justice. The case was of unusual importance. To some it appeared as an attempt to overturn the law. Others, however, considered that the old, narrow law was to be enlarged to do more complete justice—to lose a portion of its harshness in the spirit of fairness. In any event, if the claims of daughters were to be recognized, the law must be changed.

The petition of these daughters to the court was brief and to the point:

> Why should the name of our father be done away from among his family, because he hath no son? Give us therefore a possession among the brethren of our father. (Num. XXVII, 4).

This proved unanswerable. The prayer was granted. The court declared the old law to be incomplete, one-sided. It was changed not only for this case but for all like future cases. A great victory! The judgment of the court provided:

> The daughters of Zelophehad speak right; thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them.
>
> And thou shalt speak unto the children of Israel, saying, If a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter, . . . and it shall be unto the children of Israel a statute of judgment. (Num. XXVII, 7, 8, 11.)

This judgment was of tremendous significance. The judgment or decree was applicable to all the twelve tribes. It altered their very constitution or governernment. The fundamental polity of the state was changed. Whereas women had not before been counted, now they could be numbered. Whereas before in the absence of male descendants a family became extinct and the daughters penniless, now daughters could preserve the family and receive the estate.

A few months later we find Zelophehad's daughters again in court. This time "the chief fathers of the families" (Num. XXXVI, 1) of the tribe to which Zelophehad had belonged appeared before the court. Should one or more of these daughters marry into another tribe, her inheritance would go with her. Each tribe had been allotted a given amount of territory in the "Promised Land," and the possibility of the shifting of a portion of the allotment of one tribe to another tribe was a matter serious to contemplate.

With this in mind "the chief fathers" petitioned the court to give further attention to the case. This proceeding was not an appeal. No attempt was made to overturn the former judgment. The "chief fathers" sought a rehearing, and requested the court to modify the judgment by imposing certain terms or conditions upon the young women whereby the tribe would be relieved from the possibility of loss through marriage into another tribe.

Here is what "the chief fathers" said to the court:

> If they be married to any of the sons of the other tribes of the children of Israel, then shall their inheritance be taken from the inheritance of our fathers, and shall be put to the inheritance of the tribe whereunto they are received; so shall it be taken from the lot of our inheritance. (Num. XXXVI, 3.)

The rehearing was granted, and the previous judgment modified by the court as follows:

> The tribe of the sons of Joseph hath said well. This is the thing which the Lord doth command concerning the daughters of Zelophehad, saying, Let them marry to whom they think best; only to the family of the tribe of their father shall they marry. So shall not the inheritance of the children of Israel remove from tribe to tribe: for every one of the children of Israel shall keep himself to the inheritance of the tribe of his fathers. And every daughter, that possesseth an inheritance in any tribe of the children of Israel, shall be wife unto one of the family of the tribe of her father, that the children of Israel may enjoy every man the inheritance of his fathers. Neither shall the inheritance remove from one tribe to another tribe; but every one of the tribes of the children of Israel shall keep himself to his own inheritance. (Num. XXXVI, 5-9.)

In no vital respect was the original judgment altered. The right to be numbered, to inherit, and to

Note: In one of Sir Frederick Pollock's notes to Maine's "Ancient Law" he refers to the case of Zelophehad as the oldest decided case that is still cited as an authority. Its legally authoritative character is recognized by a certain Jewish community which he mentions.

preserve the family, remained. The limitation placed upon these rights was reasonable. It was necessary to preserve the balance of power among the tribes.

No dissatisfaction with the modification of the decree appears. The judgment as amended was accepted and complied with. We are told that:

> Even as the Lord commanded Moses, so did the daughters of Zelophehad: . . . And they were married into the families of the sons of Manassah the son of Joseph, and their inheritance remained in the tribe of the family of their father. (Num. XXXVI, 10, 12.)

The judgment obtained by Zelophehad's daughters, while a present victory, merely declared that they held the right to a future interest in the "Promised Land." Here again, even though no possession of the land itself were ever secured, the importance of the suit and its outcome stand out clearly.

Is it not cause for present day reflection to find that modern practice falls short of this ancient procedure sanctioned by Moses, in which a purely declaratory judgment appears as one of the earliest of all recorded judgments?

It is interesting to ascertain whether Zelophehad's daughters profited in a material way from the declaratory judgment in their favor.

The year after Zelophehad had been laid beneath the plains of Moab, another funeral train moved forth. The greatest of Israelitish leaders and of all lawgivers, Moses, was reverently placed in his sepulchre in a valley in the land of Moab, over against Bethepeor's hill.

The leadership of the children of Israel now fell upon Joshua. Shortly thereafter the waters of the River Jordan were rolled back, and the exultant Israelites marched over, into that wonderful country to which forty years of wilderness and wandering had led them—the land of Canaan—the "Promised Land"—the land "flowing with milk and honey"—the most famous country in all history, and in later years called Palestine. Was not an inheritance in this land worth fighting for?

Seven years were required to enable the children of Israel to possess themselves of their new home and future fatherland. These were seven strenuous years. The native tribes and inhabitants did not peaceably retire before the new-comers. The land was possessed by might and conquest. But at the end of seven years. Joshua made a distribution of the land, tribe by tribe, and family by family. We find it recorded:

> Zelophehad, the son of Hepher, the son of Gilead, the son of Machir, the son of Manassah, had no sons, but daughters; and these are the names of his daughters, Mahlah, and Noah, Hoglah, Milcah, and Tirzah. And they came near before Eleazar the priest, and before Joshua the son of Nun, and before the princes, saying, The Lord commanded Moses to give us an inheritance among our brethren. Therefore according to the commandment of the Lord he gave them an inheritance among the brethren of their father. (Joshua XVII, 3, 4.)

Here are presented again Zelophehad's daughters asserting their rights. This time they stand upon their declaratory judgment, as *res judicata*. The judgment is so recognized, and given effect. Was ever any court proceeding more orderly? Did ever any court proceeding accomplish more complete relief? Was it not for the welfare of all concerned that the rights of these heirs were declared before they had been violated? How much better this preventive, declaratory procedure, than a curative, coercive remedy after the property had come into the possession of adverse holders.

It is not inappropriate to add: Wherein is Zelophehad distinguishable from millions of unknown names in history? "And Zelophehad had daughters."

LETTERS OF INTEREST TO THE PROFESSION

Comedy and Humor of the Profession

Denver, Col., Jan. 16.—To the EDITOR:—In Lord Birkenhead's banquet speech at Minneapolis, printed in the December number of the JOURNAL, he said:

> I suspect that the comedy and the humor of our great profession as it is practiced in this country does not differ very greatly from those qualities as it is practiced in my own country.

Mr. Bottomly's sage suggestion that his adversary be called at the refreshment bar had more than a parallel in the booming mining camp, Aspen. The District Court Room was on the corner of the two main streets and all the principal saloons and gambling houses were crowded in the four blocks on its four sides. It was the custom when a lawyer, party or witness did not appear when wanted, for the bailiff to raise the window and call out the name three times—I shall disguise the name of the lawyer who was called on this occasion——"Ben L. Gear Ben L. Gear Ben L. Gear!" The stentorian voice of the bailiff pierced the attenuated air three times. From way down the street came a voice as if an echo: "Playing stud horse poker! Playing stud horse poker! Playing stud horse poker!" The Court understood and was more considerate than Mr. Justice Darling to the counsel who wanted the continuance.

Mr. Bottomly's answer concerning the bankruptcy petitions against him, although then unreported, was at least equaled by an adventurer from the Pacific Coast, of very charming personality, who had acquired possession of an oil property in Wyoming by a transaction in *haute finance* just a few years ago. I was trying an application for a receiver and alleged among other grounds that this gentleman was insolvent. Almost as soon as I commenced enquiry concerning his financial status, he turned to the Court and confidingly, almost familiarly, said: "Your Honor, I owe a lot of money—about six million dollars. Some of my creditors have taken judgments against me to the amount of about two millions. That's the reason I am conducting this venture in my own name, as trustee; but this doesn't bother me—I shall pay them all when I get around to it." The application for a receiver was denied.

At Boulder, a few years ago, a woman brought suit to establish a very considerable interest in a large estate of a pioneer banker; she produced a contract said to have been made when she was a child between her father and the banker; there were many circumstances to support her claim and the sympathy of the community was almost unanimous in her favor. The dead banker's associates unanimously affirmed the genuineness of the signature. After the Supreme Court had sustained the legality of the alleged contract (Oles v. Wilson, 57 Colo. 246), it appears that the claimant confessed to her attorneys that she had written and signed it. Following Dr. Johnson and anticipating Lord Birkenhead, the lawyers, instead of taking her statement to be true, took the claimant to some

skilled alienists in Denver; these said she had made the confession "under an aberration, under a delusion, in hysteria." At the trial on the merits, where I was one of counsel for the estate, Mr. Albert S. Osborn, author of "Questioned Documents," demonstrated so clearly that the document was a forgery, that at the conclusion of Mr. Osborn's testimony, plaintiff's counsel dismissed the case, evidently accepting the confession as true and disregarding Dr. Johnson, Lord Birkenhead and the alienists.

T. J. O'DONNELL.

Summing Up the Question

Castle Rock, Col., Dec. 21.—To the EDITOR: I have read with interest the various contributions which have appeared in the issues of your JOURNAL during the past few months dealing with the question of the agitation against five to four decisions of the United States Supreme Court holding acts of Congress unconstitutional, and the advisability of yielding in any degree to that agitation. I have also read the letters from members of the Association in which these contributions have been commented upon.

Your contributors and correspondents have reached with practical unanimity the following principal conclusions:

1. That the five to four decisions holding acts of Congress to be unconstitutional have in fact been very few in number.

2. That the general sentiment of the American Bar today is that these decisions were right.

3. That the attack now being made upon these decisions is, therefore, largely in the nature of a tempest in a teapot.

4. That, apart from the question of policy and expediency, there is no sound reason why legal controversies involving the question of the constitutionality of statutes should not be decided, as all other legal controversies are decided, by a majority of the Court.

In all of which conclusions I concur. But the question of policy and expediency remains. Mr. Justice Clarke, in his article in your issue for November, and Ex-Senator Beveridge, in an article in the issue of the Saturday Evening Post for December 15th, adduce arguments in favor of the proposition that it would be good policy for the Supreme Court to provide by rule (assuming it to have the power to do so) that it would not hold statutes to be unconstitutional if two or more of the Justices dissented from that view.

I say "assuming it to have the power to do so" because I have noted with some surprise the extent to which very eminent authorities differ upon the question as to where the power to do this thing resides. Ex-Senator Beveridge is emphatically of the opinion that it does not reside in Congress. He says that, if Congress were to pass such a law, "the Supreme Court would ignore it of course"; and he adds, "So Congress cannot modify the five-to-four practice." He is equally clear that the Supreme Court has the power to do this thing by a rule of court. He cites the instance of Chief Justice Marshall announcing the rule that the Court would not render a decision holding a statute unconstitutional unless a majority of the full Court concurred in such decision. But this seems to me a very different thing from saying that the court has the power to provide by rule that the opinion of a minority of the court shall prevail as against the opinion of the majority. Justice Clarke seems to agree with Ex-Senator Beveridge as regards the power of the Court to do this thing by rule. (See p. 692, column 1 of the November issue of your JOURNAL.)

After reading all that I could find to read upon the question, it seems to me to be open to serious doubt if the thing can be done by anything short of a Constitutional amendment. Senator Borah, however, does not seem to share this view, if one may judge by the bill which he is reported to have recently introduced in the Senate.

One thing seems to me to be clear, and that is that, if the power of the Supreme Court to declare acts of Congress unconstitutional is to be retained, whether it be exercised by a majority of five to four or six to three or seven to two, the Court ought to abandon the practice of declaring that it never declares a statute to be uncoustitutional unless the fact that the statute violates the Constitution appears beyond a reasonable doubt. I shall not take up your space by quoting the various forms of words in which the Court has enunciated this doctrine. Stated very conservatively, it amounts at least to this: that the Court never declares a statute to be unconstitutional in a case where any man, having the intelligence and the legal training needed to give him the right to form an opinion on the question, could honestly hold that the statute did not violate the Constitution. I confess I am unable to see how it can be said that a majority of the Court enunciating this doctrine with regard to a statute which they hold to be unconstitutional, do not thereby necessarily imply that the Judges who form the dissenting minority are either dishonest or have not the intelligence and the legal training needed to give them the right to form an opinion on the question.

I say this after giving full consideration to the able argument of your correspondent, Mr. Henry H. Wilson of Lincoln, Nebraska, in your December issue.

The doctrine is not true; and surely to keep affirming and re-affirming a doctrine which is not true is unworthy of such a Court as the Supreme Court of the United States.

WILLIAM DILLON.

The Corporation and the "Average American"

Los Angeles, Cal., Sept. 22.—To the Editor: In the August number of the "Journal," Mr. Cook presents "a little essay" on "The Corporation." In it he endeavors to analyze why "the average American believes that a corporation is not only soulless, but is also heartless, although not altogether brainless." The "average American" believes it, because no other just conclusion can well be reached.

In practice, the average corporation is not administered, so as to carry out, in good faith, the purposes for which it is created and organized, but to serve a majority clique. The managers violate their trust both to the minority stockholders and to the public, and the "political genius of today," in return, imposes taxes galore; pleading that, inasmuch as the corporation has possessed itself of ill-gotten gains, it should be made to "restore." Lex talionis!

But, of course, two wrongs never produce right. How would it do for corporation managers to try the experiment of "common honesty" for awhile, in an effort to change the sentiment of the "average American" and thus reduce corporation ills? This plan, for nations, is advocated by Dr. Butler, in his article on the "Development of the International Mind," in the same issue of the Journal. On p. 521, he quotes Chancellor Kent as follows: "States, or bodies poli-

tic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the services of the community the same binding law of morality and religion which ought to control his conduct in private life." And, he adds, *inter alia* that "there is no proper conflict between this doctrine and the theory of sovereignty." Surely the creature of sovereignty is not above its creator.

It is almost useless to give concrete illustrations of the sins of corporate management. Unfortunately, they are too numerous. Newspapers, magazines, periodicals, books, official documents, as well as personal testimony, teem with them. A very recent instance may, however, be specially referred to. A report compiled by the great Pennsylvania Railroad system discloses the following percentages paid in 1922: 51.4 for salaries and wages; 17.07 for materials and supplies; 7.29 for coal; 4.55 for taxes: 6.41 for losses and damages; 7.72 for fixed charges and interest on funded debt, leaving 5.56 to pay a return to the stockholders and sustain the company's credit.

As a matter of fact, anyone with a fair measure of experience cannot help but be convinced that a large number of the corporations of the country as at present organized, operated and manipulated, amount to little else than legalized swindles. So called "big" corporations, too. As now conducted, their common stock, generally speaking, is not fit to invest in.

Why then complain about the way they are regarded? Since they are a part of the institutions of the country; indeed, as is suggested in Mr. Cook's article, of the world, why should they not, in the interest of the country and of the world, try to measure up to the reasonable standard of morality laid down by America's great Chancellor, James Kent? If they did, the "average American" would soon give the support and credit to which they were entitled.

ANDREW T. JENKINS.

A Reply to Mr. Jenkins

New York, Dec. 1.—To the Editor: I have read Mr. Jenkins' letter with great interest, because it presents views held by many. The charges are:

(1) *The average corporation serves a majority clique.* The answer is that corporations have become too big for any clique to own or even absolutely control a majority of the stock. Statistics show that in large corporations at least, the directors and managers own a very small minority, so small indeed that the grievance is that they own too little instead of too much. This is well known in the business world, where it is also known that if the management is bad or crooked the dissatisfied stockholders sell out, the stock goes down, new managers come in, and public confidence is restored. Does any majority clique control the United States Steel Corporation or the Pennsylvania Railroad? Far from it. As to the average smaller corporation, especially those for public service, the fact is that the directors and managers do the best they can, and the majority stockholders acquiesce and send in their proxies and take in their dividends and are glad and often surprised to see the latter.

(2) *The managers violate their trust to the minority and the public.* This was largely true fifty years ago when business ethics were low, not only of corporations, but generally. It is no longer true. The practices of corporations follow the practices of partnerships and individuals and the business community in general. Witness the anti-trust prosecutions, where individuals, partnerships and corporations participate equally and indiscriminately in the profitable and cordial illegality. It is true that corporate managers may violate their trust, while, of course, principals doing business for themselves individually or as a partnership do not cheat themselves, but this danger is inherent in all *agencies* and is not peculiar to corporations. It is a failing of human nature and varies with the spirit and practice of the times. It is not due to corporations. I suppose if a "bootlegger" corporation were now formed that, too, would be charged as a *corporate* crime.

(3) *The experiment of "common honesty" by corporate managers might change the sentiment of the average American as to corporations.* This should be reversed. The requirement by the public of common honesty in its own dealings is quickly responded to by corporations; first, to keep their business; and, second, because their managers come from the public and represent the public's current standard of business morality. The stream should not be expected to rise higher than its source.

(4) *The Pennsylvania Railroad shows but 5.56 per cent for its stockholders.* It is lucky to show that, after a Labor Board and Adamson Act and state legislatures and Interstate Commerce Commission and multitudinous other commissions, have each and all taken a whack at the institution. The wonder is that it earns anything at all for the stockholders. The managers don't mind hard knocks so long as the pay is good, but if anyone wants their job he will have to have brains, courage and a whole category of fighting qualities.

(5) *Many corporations are "legalized swindles."* What are our "Blue-Sky Laws" for, except to stop just that? Bogus enterprises are not new. The South Sea Company and "Bubble" existed over two hundred years ago. "The Bubble Act" existed in England for over a hundred years and was aimed, not at corporations, but at unincorporated associations. Swindles exist always and everywhere and are not confined to corporations, either.

(6) *Why should corporations not comply with the standard of morality laid down by Chancellor Kent?* Kent referred to the standard that "ought to control . . . in private life." Exactly so. But until it does control in private life why demand a higher standard from "an artificial being, invisible, intangible and existing only in contemplation of law"? Especially where that abstract existence is managed, controlled, administered and kept alive only by men taken from "private life" with all the faults of the community and age.

WILLIAM W. COOK.

Not Inaptly, but Somewhat Mysteriously

"'Sir,' said Doctor Johnson to Erskine, 'I do not call a gamester a dishonest man; but I call him an unsocial man. Gaming is a mode of transferring property without any intermediate good. Trade gives employment to numbers, and so produces immediate good.' To this characteristic dictum may now be added that of the Select Committee's report: 'It is not inaptly described as "a mug's game."'"—*The Law Journal*, Jan. 19.

Various local bar associations are reported to be launching and lunching drives for an increase of membership.

STATE AND LOCAL BAR ASSOCIATIONS

Connecticut Approves Higher Standard of Preliminary Education for Bar Admission Applicants—Delaware Discusses Simplification of Pleading—New York Holds Interesting Annual Meeting—Vermont Favors Permanent Court of International Justice—News of Other Associations

CONNECTICUT

American Bar Association Standards for Preliminary Education Approved—Small Claims Courts—New Officers

The annual meeting of the State Bar Association was held in the Supreme Court Room in Bridgeport, January 21, 1924. The annual address was delivered by Hon. William B. Boardman, President. He discussed the decisions of our Supreme Court of Errors handed down since the last annual meeting. He also urged that the judges of the Police, Borough and Town Courts, and the justices of the peace throughout the state, meet from time to time to discuss the problems affecting administration of criminal law, pointing out that the judges of Probate have an association which holds an annual session, and which has proved to be very helpful.

Harlan F. Stone, Esq., Dean of the Columbia University Law School, gave an extremely interesting address on the American Law Institute, pointing out the necessity for re-statement of the law, and explaining the plans of the American Law Institute to make such a re-statement.

The Committee on Jurisprudence, by Edward M. Day, Esq., Chairman, reported in favor of adopting the standards of the American Bar Association for preliminary study for admission to the bar. An interesting discussion followed, at the end of which the report of the Committee was accepted and a vote was passed recommending to the judges of the Superior Court the adoption of the standards for preliminary education advocated by the American Bar Association.

The special committee on Justice for the Poor, Thomas Hewes, Esq., Chairman, reported in favor of continuing our efforts to secure the adoption by the legislature of small claims courts, and for the appointment of legal aid directors in the various counties. The Association has made two efforts to secure passage of these measures, so far without success. It was the unanimous sentiment that renewed efforts should be made before the legislature at its session in 1925 to secure these much needed reforms.

The officers elected were: Lucius F. Robinson, Hartford, President; Terrence F. Carmody, Waterbury, Vice-President; James E. Wheeler, New Haven, Secretary and Treasurer.

The annual banquet was held in the evening at the University Club in Bridgeport. The retiring President, Hon. William B. Boardman, presided as toastmaster. A very eloquent address was made by Hon. Robert E. Lee Saner of Dallas, Texas, President of the American Bar Association, on "The Vision of Our Fathers and Present Day Visionaries." The other speakers were Albert E. Lavery of Bridgeport, and the Hon. Arthur F. Ells of Waterbury, Judge of the Superior Court.

JAMES E. WHEELER, Secretary.

DELAWARE

Simplification of Pleading Discussed at Annual Meeting—New Officers Elected

At the annual meeting held on January 11th the topic under discussion was the question of whether or not Delaware should take any step toward simplified pleading by Statute. The original Common Law pleading practice is still preserved in this State, affected to a very trifling degree by statute, and some members of the Bar are inclined to believe that a practice Act, following perhaps the Pennsylvania statute, might be of substantial benefit in the simplification of producing an issue in judicial causes. There was a very interesting discussion, which will be continued at times during the year, in order that a more or less unanimous conclusion may be reached before the next meeting of the Legislature in January, 1925.

The following officers were elected: President, Josiah Marvel, Wilmington; First Vice-President, John Biggs, Wilmington; Second Vice-President, Henry Ridgely, Dover; Third Vice-President, Charles W. Cullen, Georgetown; Treasurer, Thomas C. Frame, Jr., Dover; Secretary, Leonard E. Wales, Wilmington.

NEW YORK

Discussion of Requirements for Admission to Bar at Annual Meeting—Hon. A. J. Beveridge Speaks on Supremacy of U. S. Supreme Court—Sympathy for Mr. Root

The Forty-seventh Annual Meeting of The New York State Bar Association was held in the City of New York on Friday and Saturday, January 18 and 19. The business sessions were held at the Headquarters of The Association of The Bar of The City of New York, 42 West 44th Street, while the social sessions and dinner were at the Hotel Astor.

Following the reading of the minutes of the preceding meeting, reports of officers were received and then some of the reports from Standing Committees. Under "Nominations for Membership" more than three hundred were proposed, and later admitted to membership.

Of the reports submitted the one from the "Committee on Organization of The Entire Bar of The State of New York" received general discussion and was finally approved.

The afternoon session opened with the address of the President. The subject chosen by President Dykman was "The Home Rule Amendment to the Constitution." A Bill to this end is now before the Legislature of the State of New York. It aims to give to cities and towns the right to a larger measure of self-government. The recommendations of the President in his address were referred to a committee.

The most important committee report submitted during the afternoon session was from the Committee on Preliminary Qualifications for Law Studies. There was very general and interested discussion of this re-

port, which the Executive Committee and the Law Reform Committee at their joint meeting had selected as the topic for general discussion from the following angles: "Should the requirements for admission to the bar in this state be changed or modified, particularly as regards (1) Preliminary Education; (2) Ascertainment of Character; (3) Legal Knowledge? If so, in what respects?" The joint committee had selected to open the discussion of this topic Messrs. George W. Wickersham, Judge J. Newton Fiero, Dean Harlan F. Stone, Philip J. Wickser, Secretary of the State Law Examiners, Arthur E. Sutherland, Leslie J. Tompkins and Judge William Roche. It was soon seen that the desired discussion would have to go over to the forenoon session of Saturday, and be made a Special Order. The session adjourned at five-fifteen.

The evening session, at the Hotel Astor, was a most interesting one. Hon. Albert J. Beveridge, former United States Senator from Indiana, was the sole speaker, and his topic: "The Supremacy of The United States Supreme Court" was one charged with high interest for the large gathering. Senator Beveridge was exceedingly well received, very frequently applauded, and at the conclusion of his remarks was elected an honorary member of the Association.

The Saturday forenoon session first took up "Unfinished Business," then resumed the reception of Committee Reports, and later reverted to the Discussion of the "Preliminary Qualifications for Law Studies." Messrs. Wickersham, Stone, Wickser and others spoke in favor of the Committee's recommendation of a necessary qualification of two years in college; while Judge A. T. Clearwater, Julius Henry Cohen, William Roche and many others spoke in favor of an educational test rather than the particular channel of a college course. This resulted in a change in the recommendation of the Committee Report to include a two years' college course or its educational equivalent.

Louis Marshall, speaking at the othernoon session on "The Obligations of Citizenship," attacked the proposed immigration act making the admissable quota of any nation 2 per cent of that nation's immigration to the United States in the year 1890. This proposal, he said, looked as though it might have been dictated by the Ku Klux Klan. He deplored the objections to eastern and southern European peoples and criticized the earlier immigrants from western and northern Europe and their descendants for aiding in the "descrimination" against the newcomers of today. He believed that there was no greater humbug than "the recent creation by anthropologists of what is called the Nordic race."

At the closing session of the Association's annual meeting, Col. William N. Dykman of Brooklyn was re-elected president, Charles W. Walton of Albany, secretary, and Loran L. Lewis, Jr., of Buffalo, treasurer. A resolution was adopted recommending that the standard of preliminary education as a condition to registration for the study of law established by the Court of Appeals in the State be increased from one to two years of college work or its equivalent.

The final function was the Annual Dinner, always very well attended by members of the Bar, about nine hundred being present. President Dykman presided as toastmaster. The speakers were Governor Smith of New York, who spoke of "The Proposed Budget System"; Hon. N. K. LaFlamme, whose topic was "The Canadian Bar," and Augustus Thomas, the playwright, who spoke of "The Fundamentals of Government," and indulged in much lively and humorous tilting at the Eighteenth Amendment.

A resolution on the illness of Mr. Root was introdueed by William J. Roche of Troy and adopted. It follows:

> The members of the New York State Bar Association, assembled at the dinner held in connection with the annual meeting of the association, express their sincere regret at the illness of the Hon. Elihu Root, a former president of the association, which disables him from being with them tonight, and they give voice to the hope that he will be speedily restored to the health and vigor that will enable him to continue his valuable service to his country and to the world, and for many years to come to enjoy the respect and admiration of his countrymen.

At the invitation of Gov. Smith the association authorized the president to appoint a committee of five to confer with the Governor on a proposed budget system for the State.

NORTH CAROLINA

Annual Meeting at Pinehurst May 1-3—President Saner on the Program

At the recent meeting of the executive committee of the North Carolina Bar Association, the noted Carolina resort, Pinehurst, was selected as the place for the next meeting of the Association, on May 1, 2 and 3. An early date was chosen in order not to conflict with the meeting of the American Bar Association at Philadelphia, which will be attended by a large number of North Carolina lawyers. Among the principal speakers from outside the state will be President R. E. L. Saner, of the American Bar Association. The arrangement of the program was left in the hands of President E. S. Parker, Jr., E. M. Land, chairman of the executive committee, and Secretary H. M. London.

OHIO

State Association Mid-Winter Meeting Well Attended—Conference of County Bar Association Delegates Created

With the largest attendance in the history of the Association, the Mid-Winter Meeting of the Ohio State Bar Association, held in Columbus, Ohio, was called to order Friday, January 25th, by the President, Hon. William L. Hart, of Alliance. After the invocation by Rev. P. H. Murdick, D. D., the address of welcome was delivered by the Governor of Ohio, Hon. Vic Donahey. He urged the enactment of uniform laws, simplification of the statutes, and uniformity in municipal court procedure in Ohio. He said he hoped that the new judicial council, created by the last legislature at the suggestion of the State Bar Association, will work jointly with the Association to bring about results that will benefit the state.

President Hart then delivered his address, dwelling on the difficulties of realizing exact justice and declaring that "It must constantly be the purpose of the lawyer and the courts, in working out the infinite rights of the people, to make the rules of law approach as far as possible the principles of abstract justice and to put the greatest measure of justice in the enforcement of law." Committee reports followed the address of the President. The adoption of the report of the Committee on Admission, presented by W. G. Thompson of Lebanon, Ohio, gave the Association 208 new members. George W. Ritter, of Toledo, Ohio, gave the report of the Legislative Committee, and Smith W. Bennett, of Columbus, reported for the Delegates to the American Bar Association on the meeting at Minneapolis.

Chairman Louis H. Winch, Cleveland, presented the report of the Committee on Revision of the Constitution of the Association. It proposed

an amendment changing the term of office of members of the Executive Committee from one to three years, three to be elected each year, which was adopted. A second proposal creating a section of the State Association to be called "Conference of (County) Bar Association Delegates," also was adopted. The purpose of this Conference is to create a better understanding between the members of the Bar of Ohio and to bring about a better and more effective co-operation among the Bar Associations of the state with the Ohio State Bar Association.

The report of the Committee on Judicial Administration and Legal Reform, read by the Chairman, John A. Cline, of Cleveland, was interrupted by a brief but acrimonious debate over a proposed constitutional amendment to equalize judges' salaries (which vary because of the present constitutional provision forbidding the legislature to raise the salary of an incumbent) and to lengthen their terms of office to not less than ten years. Chairman Cline vigorously defended the committee's recommendation, which was finally adopted. Other recommendations of the committee which received approval were for a uniform municipal court code; revision of the workmen's compensation statutes so as to permit the furnishing of original evidence upon appeal from decisions of the industrial commission; revision of statutes relative to disbarment so that suspension or disbarment in any court shall operate as a suspension or disbarment in all courts of the state: Provision for appointment of expert witnesses by the court.

The first session of the convention closed with the meeting of the prosecuting attorneys' section. Chairman E. C. Stanton, of Cleveland, presided, and Mrs. Jessie Alder, of Cincinnati, assistant prosecuting attorney of Hamilton county, delivered an address on foreclosure proceedings for delinquent taxes.

The first part of the second session was given over to the meeting of the Judicial Section, Chairman C. T. Marshall, Chief Justice of the Ohio Supreme Court, presiding. After the meeting was called to order Chief Justice Marshall administered the oath to candidates successful in the December bar examination. This was followed with an address "Justice Without Denial or Delay" by Judge Homer G. Powell, Chief Justice of the Common Pleas Court of Cuyahoga county (chosen under the law enacted by the last General Assembly).

Upon opening of the final session former Secretary of War, Newton D. Baker offered a resolution endorsing the Permanent Court of International Justice. This was referred to the Committee on Judicial Administration and Legal Reform, which reported its approval of the resolution. Mr. Baker then introduced Manley O. Hudson, of the Law Department of Harvard University, who addressed the Association upon the formation and work of the Permanent Court. Judge Frank W. Geiger, of Springfield, Ohio, opposed the resolution, and Mr. Baker spoke in favor of it. Action favoring the resolution came after Mr. Hudson had pointed out that the World Court would in no way bind the United States to the League of Nations and that it does not represent an alliance with the Treaty of Versailles.

R. E. L. Saner, President of the American Bar Association delivered an address in which he sounded a warning against the "increasing practice of enactment of legislation by organized minorities," and said that the very foundations of the American constitution are being threatened.

The meeting closed with the announcement by President Hart of the following delegates and alternates to the 1924 American Bar Association Meeting. Delegates: Province M. Pogue, Cincinnati; Judge John J. Sullivan, Cleveland; D. W. Iddings, Dayton. Alternates: Judge Charles B. Hunt, Coshocton; Phil S. Bradford, Columbus, and James P. Wilson, Cleveland.

At an extra session the new section of the Association, the Conference of Delegates, was organized and the following officers and members chosen: Chairman, George B. Harris, Cleveland; Vice-Chairman, N. R. Harrington, Bowling Green; Secretary, Robert C. Mason, Columbus; Treasurer, John F. Carlisle, Columbus. Council—1st district, Walter A. Ryan, Cincinnati; 2nd, Hon. C. D. Laylin, Columbus; 3rd, Ralph P. Mackenzie, Lima; 4th, Hon. H. T. Bannon; 5th, Hon. A. L. Agler, Canton; 6th, H. P. Whitney, Toledo; 7th, J. P. Wilson, Youngstown; 8th, Louis H. Winch, Cleveland; 9th, G. A. Resek, Lorain.

RHODE ISLAND

State Association Hears Address by President Saner—Officers Elected

President Saner of the American Bar Association addressed the Rhode Island Bar Association at its recent annual dinner at Providence on Dec. 3 on the subject of "The Vision of Our Fathers and Present-Day Visionaries." The address was broadcast by radio and a number of commendatory comments were made on the address by absent hearers. President Greenough presided as toastmaster.

At a business meeting which preceded the dinner the following officers were elected for the ensuing year: President William B. Greenough; Vice-President, George H. Huddy, Jr.; Second Vice-President, Lellan J. Tuck; Secretary, Elisha C. Mowry; Treasurer, Herbert W. Sherwood; Executive Committee, Chauncey E. Wheeler, Ralph T. Barnefield, John H. Slattery, Francis B. Keeney and James H. Rickard.

VERMONT

State Bar Association Adopts Resolution in Favor of Permanent Court

The Forty-sixth annual meeting of the Vermont State Bar Association was held at Montpelier on January 2 and 3. Hon. Warren R. Austin, President, delivered an address on "Patriotism by Lawyers," and Hon. George W. Wickersham of New York City spoke on "The Permanent Court of International Justice." The session on Thursday morning was devoted principally to reports of committees. At the afternoon session George L. Hunt spoke on "Probation of Criminals in Vermont," and Robert E. Healy, Chairman, presented the report of the special committee on Court Rules. At the banquet Thursday evening the speakers were Hon. Franklin S. Billings, Lieutenant-Governor; Hon. John S. Buttles, Commissioner of Industries; Hon. Warner R. Graham, Superior Judge; and Hon. Fred M. Butler, Justice of the Supreme Court.

The following officers were elected for the new year: Stanley C. Wilson, Chelsea; Vice-Presidents,

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P. M. Meldon, Rutland; J. Rolf Searles, St. Johnsbury; M. M. Wilson, Randolph; Secretary, George M. Hogan, St. Albans; Treasurer, Fred E. Gleason, Montpelier. Board of Managers—Stanley C. Wilson, Warren R. Austin, George M. Hogan and Fred E. Gleason, *ex-officio;* William R. Rierden, Barton; John C. Sherburne, Randolph; Walter S. Fenton, Rutland; Librarian, George M. Hogan, St. Albans.

The following resolution was unanimously adopted:

> RESOLVED, that the Bar Association of the State of Vermont joins in what is believes to be the wise judgment of the American people, that the United States ought to become one of the supporters of the Permanent Court of International Justice at the Hague, and that our Government, therefore, should adhere to the protocol establishing the Court in the manner set forth by President Harding in his message to the Senate of February 24, 1923, which recommendation was recently approved and renewed by President Coolidge in his message to Congress.
>
> RESOLVED, that a copy of this resolution be sent to each member of the Vermont Delegation in Congress.

WEST VIRGINIA

Notes of Recent Annual Meeting Held at Morgantown—Next Meeting at Webster Springs

The West Virginia Bar Association held an interesting and instructive meeting at Morgantown, beginning Nov. 15. President R. E. L. Saner, of the American Bar Association, delivered an address on "The Lawyer and the State," which was exceedingly well received. Gen. T. S. Riley, of Wheeling, President of the State Association, took as his subject "one of the most vital questions before the courts, the lawyers and the nation in general," "Marriage and Divorce." Judge W. E. Baker, of the U. S. Court for the Northern district of West Virginia, was called on and made an impromptu talk on the immense increase of business in the Federal Courts. Other addresses on the program were "The Reorganization of Our Courts," by Harold H. Ritz, and "The Work of the Code Commission," by a member of that body. The Association was welcomed to Morgantown by Judge I. G. Lazzelle, and Judge J. B. Sommerville of Wheeling made a brief, cordial and entertaining response.

Various recommendations of the Executive Council were adopted, one of them being for the appointment of a committee to cooperate with the State Code Commission in preparing a new code, and another for the adoption of uniform state laws so far as this is justified by conditions in the state.

Mr. Clarence E. Martin of Martinsburg was elected President and the following other officers were chosen: Vice-Presidents: James R. Curb, Wheeling, first district; James R. Moreland, Morgantown, second district; Charles P. Swint, Weston, third district; Louis H. Miller, Ripley, fourth district; Thomas H. S. Curd, Welch, fifth district; W. L. Lee, Fayetteville, sixth district; Austin V. Wood, Wheeling, Secretary; C. A. Kreps, Parkersburg, Treasurer, the last two being re-elected. Executive committee — Mason S. Ambler, Parkersburg; Kemble White, Fairmont; S. P. Bell, Spencer; David C. Howard, Charleston. Delegates to American Bar Association, George C. Baker, Morgantown; Henry Sims, Huntington; John M. Baker, Spencer.

The 1924 meeting will be held at Webster Springs.

Legal Hospitals for Poor Litigants

"In one of the most interesting papers read at the Plymouth Meeting of the Law Society—interesting, because constructive—Mr. P. H. Edwards outlined a scheme of legal aid for the poor which, however open it may be to criticism, well deserves to be considered by the Committee appointed by the Lord Chancellor to consider the Poor Persons system. That system, which throws a heavy burden upon solicitors who are public-spirited enough to assist it, has admittedly broken down. Sir Claud Schuster, in the significant speech he made at the banquet, stated emphatically that, if a larger number of solicitors did not see their way to assist in administering the 'Poor Persons' Rules, the profession would be faced with the 'deplorable' alternative of an official system of legal aid. If Mr. Edwards' scheme provides a better method, the profession would do well to examine it. What, in brief, he proposes is that 'a Legal Hospital' should be established, with an executive committee consisting of one-third barristers, one-third solicitors, and one-third laymen.

> "This Institution should have a central establishment where a solicitor or solicitors would be employed in the same way as a house-surgeon in an ordinary hospital, and he would be paid for his services. It will also have the ordinary paid staff of a solicitor's office. It is suggested that solicitors' articled clerks should have the opportunity of being present when advice is given and participating in the carrying out of any cases undertaken. The honorary solicitors and barristers would attend at fixed times in the same way as surgeons and physicians now attend the London hospitals."

"Upon this scheme, so far as Mr. Edwards has outlined it, two criticisms may be offered. He appears to contemplate the creation of only one 'Institution.' 'As the scheme developed,' he says, 'lectures might be given and the whole institution developed into a teaching and training University for the purpose of legal education, and be a useful extension of the legal classes held by the Society with so much benefit to law students.' He even proposes that any time devoted by articled clerks to the 'Legal Hospital' should count for their articled period. But would one 'Legal Hospital' be more adequate for its purpose than a single medical hospital for its? How would an institution in London, under the supervision of the Law Society, be of assistance to a poor person in Sunderland or Truro? If, on the other hand, Mr. Edwards contemplates the creation of 'Legal Hospitals' in all convenient centres, who is to bear the expense of maintaining them? Even ordinary hospitals suffer from lack of funds. The Government might, of course, be invited to make grants, but the danger of Government help always is that it may result in Government control, and that, as Sir Claud Schuster has pointed out, lets in the evil of officialism."—*The Law Journal,* Oct. 13, '23.

Annual Meetings in California and Texas

The annual meeting of the Texas Bar Association is to be held in Dallas July 1, 2 and 3, according to a decision reached recently by the board of directors of the organization. A state-wide membership campaign, headed by Charles D. Turner of Dallas, was also authorized by the directors.

The 1924 convention of the California Bar Association wil be held at Santa Catalina Island, September 11, 12 and 13. The sessions of the convention will be held in the Hotel St. Catherine. The arrangements for the convention are in the hands of the Los Angeles Bar Association and a most enjoyable session is promised.